I 1.69/a : 86/2

HARVEY SHEEHAN AND HAZEL HOLLAND MUDON*

39 IBLA 56

Decided *January 16, 1979*

Appeal from decision of the South Dakota Area Office, Bureau of Land Management, apportioning lands between grazing lease applicants, MT 020–78–2.

Reversed and remanded.

1. Grazing Leases: Generally—Grazing Leases: Apportionment of Land

An area manager's decision apportioning lands between two grazing lease applicants ordinarily will not be disturbed where both applicants have equal preference rights, the apportionment is consistent with the regulatory criteria of 43 CFR 4121.2–1(d) (2), and the decision is not shown to be arbitrary or capricious. However, where a new statute, sec. 402 of the Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1752(c) (West Supp. 1978), dictates that in certain circumstances "the holder of the expiring permit or lease shall be given first priority for receipt of the new permit or lease," the apportionment must be conformed therewith.

2. Grazing Leases: Generally—Grazing Leases: Apportionment of Land—Regulations: Generally—Regulations: Interpretation—Regulations: Validity

In view of 43 U.S.C.A. § 1752(c) (West Supp. 1978), which dictates that in certain circumstances the present grazing user shall have a right of first refusal for any new lease, 43 CFR 4110.1(a) (43 FR 29070, July 5, 1978), must be read *in pari materia* therewith and with 43 CFR 4130.2(e) (43 FR 29072) to be construed as a valid regulation and must be interpreted not to apply were the present grazing user desires a new lease and otherwise meets the statutory and regulatory criteria.

APPEARANCES: Charles M. Thompson, Esq., May, Adam, Gerdes & Thompson, Pierre, South Dakota, for appellant Harvey D. Sheehan; and William J. Srstka, Jr., Esq., Duncan, Olinger, Srstka, Maher, & Lovald, P. C., for appellant Hazel Holland Mudon.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

Hazel Holland Mudon and Harvey Sheehan each separately appeal from a decision of the South Dakota Area Manager, Bureau of Land Management (BLM), dated May 24, 1978, by which an apportionment of land was made between two grazing lease applicants (appellants herein) for the same lands within the South Dakota Resource Area (MT–020–78–2). The lands in issue, located in Stanley County, South Dakota, contain 280 acres and are described as follows: T. 7 N., R. 29 E., sec. 27, SW ¼, W ½ SE¼, SE ¼ SE ¼, Black Hills guide meridian. Sheehan who, together with his predecessors in interest, had leased this land since 1964, filed application to renew his lease on Mar. 24, 1978. Mudon's grazing lease application for the same land had been filed on Feb. 13, 1978.

*Not in Chronological Order.

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In his decision the area manager stated that: a field inspection was held on May 22, 1978; both applicants were qualified property owners and livestock operators; both had a need for livestock forage; both had an historical use of the area; the topography was quite rough with sharp draws and narrow-topped ridges; the Mudon ranch would benefit from the use of the area for livestock movement east to west; and a county road allowed public access to the lands. The area manager divided the land between the two applicants as follows: Hazel Mudon was awarded the W ½ SE ¼, SE ¼ SE ¼ sec. 27 for a total of 120 acres. Harvey Sheehan was awarded the SW ¼ sec. 27 for a total of 160 acres. The division was made subject to the following conditions:

1. The fence on the northeast side of the public lands * * * will be relocated to the new location * * * by Hazel Mudon.
2. All fence materials not used will be stockpiled beside the county road in the SW ¼ SE ¼.
3. The location of the new fence will be as near as practicable to the ¼ line in the S ½ of sec. 27.
4. This fencing will be completed by Sept. 30, 1978.

In his statement of reasons Sheehan asserts that the division is unfair because the fence was constructed and paid for by the Sheehans; that Mudon has used the land for grazing gratis for many years, and that Sheehan has leased the land for many years.

Mudon asserts in her statement of reasons that the land was leased by her predecessors in interest in 1948, that this lease was terminated in 1956, when the U.S. Corps of Engineers took the land for the Oahe Dam pursuant to PLO 1312 (July 6, 1956). She points out that she applied for, but did not obtain, a lease to the land in 1968. She further states that she owns land on either side of the land in question and that loss of part of the land would divide and cripple her ranch. She asserts that there is a dam upon the land in question which was built by her predecessors in interest and that due to the Sheehan lease she has been deprived of use of this dam.

Sheehan denies that the dam on the property was built by Mudon's predecessors in interest.

The file contains two memoranda by the area manager, dated June 26 and July 14, 1978, which comment upon several of the points raised by the appellants and amplify the decision appealed from. The area manager points out that:

a) Mudon's predecessors in interest had a lease on the subject land from Apr. 6, 1948 to Apr. 5, 1958;

b) the fence, which was not authorized by BLM, was constructed approximately 1961, when Sheehan held a lease on the land;

c) the dam was not authorized and did not enter into the decision appealed from;

d) the NE ¼ SE ¼ was withdrawn for Oahe reservoir by public land order 1312 between Apr. 6, 1958 and Oct. 11, 1960, when the land was unleased.

The June 26, 1978, memorandum concludes as follows:

Since 1962 W. K. Holland and Hazel Mudon have tried to regain the public lands leased in their 4/6/48 lease. This

has caused hard feelings and considerable time and effort to be spent by all parties concerned. As both applicants have the same preference rights, the decision to split this area was based on the general needs of both applicants, and on the topography of the area. They both use the lands for grazing livestock and have need of the forage produced on the public land. The topography is rough breaks and the ridges run north to south. This decision would allow Mudon livestock easier movement along the Oahe reservoir shoreline.

On Oct. 6, 1978, the Board issued an order affording the appellants an opportunity to make additional showings in response to June 26 and July 14 memoranda. Counsel for appellant Mudon has submitted a newspaper clipping from the *Daily Capital Journal*, Pierre, South Dakota, dated Aug. 18, 1978. The article states that on Aug. 11, 1978, "Title to approximately 34,000 acres of land * * * was transferred from Harvey Sheehan to Lowell Light and Associates of Wheeling, Illinois for $4,565,000." No additional submissions have been received from appellant Sheehan.

[1] The decision appealed from was based on 43 CFR 4121.2–1(d)(2), which states the criteria for determining the apportionment of lands between conflicting applicants for grazing leases:

> The Authorized Officer will allocate the use of the public land on the basis of any or all of the following factors: (i) Historical use, (ii) proper range management and use of water for livestock, (iii) proper use of the preference lands, (iv) general needs of the applicants, (v) topography, (vi) public ingress and egress across preference lands to public lands under application * * * (where access is not presently available), and (vii) other land use requirements. [Footnote omitted.]

Cf. 43 CFR 4110.5 (43 FR 29070 of July 5, 1978). The area manager considered several of these elements and the allegations presented on appeal fail to show how his apportionment of the land, including the stipulations, was either arbitrary or inequitable to either appellant. Nor has Mudon, to whom the fencing requirement applies, objected to that aspect of the decision. Since no convincing reason to disturb the area manager's decision has been offered, ordinarily the decision would be sustained. *John Rattray*, 36 IBLA 282 (1978); *Wesley Leininger*, 28 IBLA 93 (1976). *Cf.* 43 CFR 4.478(b).

[2] However, sec. 402(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), Oct. 21, 1976, 90 Stat. 2773, 43 U.S.C.A. § 1752(c) (West Supp. 1978), dictates that in certain circumstances "the holder of the expiring permit or lease shall be given first priority for receipt of the new permit or lease." The record does not reveal that Sheehan fails to satisfy any of the statutory conditions precedent for that preference. H.R. Rept. No. 94–1163 buttresses our conclusion as to the meaning of the statute by reciting that:

> Subsection (c) specifies that upon expiration of a least [*sic*] or permit existing users would have a right of first refusal for any new lease or permit, provided that grazing will be continued by

the Secretary concerned and they are in good standing and accept the terms and conditions of the new lease or permit.

But 43 CFR 4110.5 (43 FR 29070) [1] provides as follows:

4110.5 Conflicting applications.

When more than one qualified applicant applies for livestock grazing use of the same public land and/or where additional forage or additional land acreage becomes available, the authorized officer may allocate grazing use of such land or forage consistent with the land use plans *on the basis of any of the following factors:*

(a) Historical use of the public land (see § 4130.2(d));

(b) Proper range management and use of water for livestock;

(c) General needs of the applicants' livestock operations;

(d) Public ingress and egress across privately owned or controlled land to public lands;

(e) Topography;

(f) Other land use requirements unique to the situation. [Italics supplied.]

In the case at bar, Sheehan as the holder of the present lease, has a right of first refusal if he otherwise meets the other statutory criteria. The regulation, 43 CFR 4110.5 (43 FR 29070), must be read *in pari materia* with 4130.2(e) (43 FR 29072), which states:

(e) Permittees or lessees holding expiring grazing permits or leases shall be given first priority for receipt of new permits or leases if:

(1) The lands remain available for livestock grazing in accordance with land use plans (see subpart 4120);

(2) The permittee or lessee is in compliance with the regulations contained in this part and the terms and conditions of his grazing permit or lease; and

(3) The permittee or lessee accepts the terms and conditions to be included in the new permit or lease by the authorized officer.

The apparent fact that there may now be a successor to appellant Sheehan's interest is beyond the ambit of this decision; we hold only that the decision appealed does not comport with the statutory criteria of FLPMA and with 43 CFR 4130.2(e) (43 FR 29072). The qualifications of Sheehan's successors as grazing lease applicants are a matter for BLM's original jurisdiction.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and remanded for appropriate action consistent with 43 CFR 4130.2(e) (43 FR 29072).

FREDERICK FISHMAN,
Administrative Judge.

WE CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

JAMES L. BURSKI,
Administrative Judge.

[1] This appears in the *Federal Register* of July 5, 1978.

APPEAL OF RICHARD R. ROBINSON*

3 ANCAB 140

Decided *January 31, 1979*

Decision of the Alaska State Office, Bureau of Land Management AA-6685-B, 43 FR 14545 (1978) reversed in part.

1. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

Pursuant to the policy of the Department of the Interior as set forth in Secretarial Order 3029 (43 FR 55287 (1978)), open-to-entry leases issued prior to the passage of ANCSA must be excluded from lands conveyed to village corporations pursuant to the Alaska Native Claims Settlement Act of December 18, 1971, 85 Stat. 688; 43 U.S.C. §§ 1601-1611 (Supp. V, 1975).

APPEARANCES: Richard R. Robinson, pro se; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY

ALASKA NATIVE CLAIMS APPEAL BOARD

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145 (1976), and the implementing regulations in 43 CFR Part 2650, *as amended*, 41 FR 14737 (1976) and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Pursuant to regulations in 43 CFR Part 2650, *as amended*, and Part 4, Subpart J, the State Director is an officer of the United States Department of the Interior who is authorized to make decisions on land selection applications involving Native corporations under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

DISCUSSION

Ninilchik Natives Association, Inc., filed selection application AA-6685-B, for the surface estate of lands located in the Ninilchik area, under § 12(a) of the Alaska Native Claims Settlement Act of Dec. 18, 1971 (85 Stat. 688, 701; 43 U.S.C. §§ 1601, 1611 (Supp. V. 1975)) (hereinafter ANCSA).

In the decision here appealed, the Alaska State Office, Bureau of Land Management (BLM) approved conveyance of approximately 70,659 acres of the selected land to Ninilchik Natives Association, Inc. This included approximately 68,000 acres properly selected by and tentatively approved in part to the State of Alaska under the Alaska Statehood Act of July 7, 1958 (72 Stat. 339-340; 48 U.S.C. Ch. 2, Sec. 6 (b) (1970)) (hereinafter the Statehood Act). The tentative approval previously granted to the State of

*Not in Chronological Order.

Alaska was rescinded, and the State's selection applications were rejected, because § 11 (a) (2) of ANCSA withdrew, subject to valid existing rights, such tentatively approved lands within the townships withdrawn by § 11 (a) (1) for selection by the Native village corporation.

During the period between tentative approval of the State's land selections under the Statehood Act and enactment of ANCSA, the State created certain third-party interests in the lands to which it had received tentative approval. These interests included "open–to–entry" leases, granted under a program which permitted leasing of recreational lands for specified terms, and eventual purchase of the surface estate in such lands at a negotiated price under the provisions of State law. (A.S. 38.05.077)

The appellant holds a State Patent, No. 3423, described on its face as follows:

> Alaska State Land Survey No. 75–138, located within Section 20, Township 2, South, Range 12 West, Seward Meridan, containing 5.00 acres, more or less, according to the survey plat recorded in the Homer Recording Office on Apr. 29, 1977 as Plat No. 77–30.

The patent was executed by the Director of the Division of Lands and Water Management, Department of Natural Resources, State of Alaska, on Oct. 13, 1977.

Appellant received his patent through the open–to–entry leasing program. According to appellant's statement in his notice of appeal, uncontradicted on the record, his father, William C. Robinson, originally staked the land as an open–to–entry lease (ADL 41074) on Oct. 23, 1968 and gave the lease to the appellant on Nov. 16, 1973. Appellant then had the land surveyed in 1976 and, upon approval of the survey, received the patent.

The decision appealed from states:

> * * * * *
>
> The grant of lands shall be subject to:
>
> * * * * *
>
> 5. The following third-party interests, if valid, created and identified by the State of Alaska, as provided by section 14(g) of the Alaska Native Claims Settlement Act of Dec. 18, 1971 (85 Stat. 688, 704; 43 U.S.C. 1601, 1613(g) (Supp. V, 1975)):
>
> a. Open-to-entry leases, including the right of the lessee to exercise the option to purchase the surface estate at a negotiated price under the provisions of A.S. 38.05.77 [sic]:
>
> * * * * *
>
> 4. ADL 41074 located in the NW ¼ SW ¼ of section 20, T. 2 S., R. 12 W., Seward Meridian.
>
> * * * * *
>
> Appellant protests conveyance of the land comprising his open-to-entry lease and, presently his patent, to Ninilchik Natives Association, Inc., subject to the lease; he seeks to have the leased and patented land specifically excluded from the conveyance.

Departmental policy on third–party interests as valid existing rights was the subject of a Secretarial Order 3016 dated Dec. 14, 1977. The Order stated in pertinent part:

> Sec. 1 *Purpose.* The purpose of this Order is to resolve for the future certain

specific questions which have arisen in the implementation of that Act.

Sec. 2 *Policy.* By this Order I hereby adopt the memorandum from the Solicitor dated Nov. 28, 1977 (copy attached), as the position of the Department on the subject of valid existing rights under the Alaska Native Claims Settlement Act. I conclude that if prior to the passage of the Alaska Native Claims Settlement Act (ANCSA) lands which were tentatively approved for state selection were conveyed by the State of Alaska to municipalities or boroughs, leased by the State with an option to buy under Alaska Stat. § 38.05.077, or patented by the State under Alaska Stat. § 38.05.077, valid existing rights were created within the meaning of ANCSA. *I also conclude that land covered by such a lease from the State should be included in any conveyance to a Native corporation, but the option to buy will be enforceable by the lessee against the Native corporation. The Bureau of Land Management should identify any third party interests created by the State, as reflected by the land records of the State of Alaska, Division of Lands, and serve notice on all parties of each other's possible interests, but this Department should not adjudicate these interests.* This Order is not intended to disturb any administrative determination contained in a final decision previously rendered by any duly authorized Departmental official. (Italics added.)

* * * * *

However, at the time this appeal was filed, the Secretary was in the process of reconsidering the above-quoted Secretarial Order and had solicited briefs and memoranda from numerous interested parties for review and consideration.

On Nov. 20, 1978, the Secretary of the Interior issued Secretarial Order 3029, which canceled and replaced Secretarial Order 3016 as a statement of Departmental policy on valid existing rights under ANCSA. (43 FR 55287 (1978)).

Secretarial Order 3029; in sec. 2 states:

* * * * *

Sec. 2 *Policy.* By this Order I hereby adopt the Memorandum from the Solicitor, dated Oct. 24, 1978, (copy attached), as the position of the Department on the subject of valid existing rights under ANCSA. I reaffirm my conclusion in Order 3016 that, if prior to the passage of ANCSA, lands which were tentatively approved for selection by the State of Alaska were (a) tentatively approved or patented by the State to municipalities or boroughs; or (b) patented or leased by the State with an option to buy under Alaska Statue [sic] 38.05.077 (the so-called "open-to-entry" program); then valid existing rights were created within the meaning of ANCSA. *I also now conclude that lands covered by such open-to-entry leases from the State should not be included in conveyances to Native corporations. The Bureau of Land Management should identify third party interests created by the State, as reflected by the land record of the State of Alaska, Division of Lands, and serve notice on all parties of each other's possible interests, but this Department should not adjudicate these interests.* * * * (Italics added.)

The Solicitor's Memorandum of Oct. 24, 1978, referenced by the Secretary, finds that protection for third-party interests created by the State is provided by ANCSA without reference to common law principles. The Solicitor in discussing the definition of "valid existing rights" quotes § 14(g) and § 22(b) of ANCSA, as well as regulations

contained in 43 CFR 2650.3–1(a) as follows:

> Sec. 14(g) provides in pertinent part: Where prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under sec. 6(g) of the Alaska Statehood Act) has been issued * * * the patent shall contain provisions making it subject to the lease contract (etc.) * * *.
>
> Sec. 22(b) directs the Secretary "to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites or small tract sites, and who have fulfilled all the requirements of law prerequisite to obtaining a patent."

43 CFR 2650.3–1(a):

> Pursuant to secs. 14(g) and 22(b) of the act, all conveyances issued under the act shall exclude any lawful entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under sec. 6(g) of the Alaska Statehood Act), contracts, permits rights-or-way [sic], or easements.

The Solicitor notes "this regulation makes a basic distinction between rights 'leading to acquisition of title' and 'rights of a temporary nature.' The former are excluded from the conveyance, the latter are included but protected for the duration of the interest."

The Solicitor concludes that Departmental regulations have construed valid existing rights under ANCSA to include rights perfected or maintained under State as well as Federal laws leading to the acquisition of title, noting that third-party interests created by the State can be considered to have been created "under" the Statehood Act, which is a Federal Statute. The Solicitor's memorandum further contains the following discussion of open–to–entry leases:

> * * * * *
>
> b. *Open–to–Entry Leases.*
>
> The issue of whether or not "open–to–entry" leases are valid existing rights and how they should be processed by the BLM has also been raised.
>
> The State "open–to–entry" leasing program, A.S. 38.05.077, provides for the issuance to qualified applicants a five–year lease (renewable for five years) to not more than five acres of State land classified as "open–to–entry."
>
> It further provides:
>
> "(4) Before a person may purchase the parcel of land upon which he has entered he shall have a survey made of the entry * * *.
>
> * * * * *
>
> "(6) When the entry has been made upon land that has been selected by the State and upon which the State has not received tentative approval or patent, the entry shall be approved only on the basis of a renewable lease. When tentative approval or patent has been received by the State, the lessee may relinquish his lease and acquire patent to the entry by negotiated purchase upon the terms and conditions provided for in this section."
>
> The program contemplated here is a lease with an option to buy at a negotiated price. It is a lease which could at the election of the lessee lead to the acquisition of title.
>
> Under the analysis set forth above, third party interests created by the State are protected regardless of whether they

are of a temporary nature or lead to the acquisition of title. However, for the purposes of 43 CFR 2650.3-1(a), it must be determined whether land covered by an open-to-entry lease should be excluded from the conveyance, or whether it should be included in the conveyance which would be issued "subject to the lease."

After reviewing my original opinion on this issue, I have now concluded that lands subject to open-to-entry leases which were issued prior to Dec. 18, 1971, and which are within a Native selection should not be included in or counted against lands conveyed to Native corporations. Under this procedure the State continues to administer the program in accordance with its laws. If the lessee fails to exercise the option to purchase, the affected Native corporation can either have the land conveyed as part of its original entitlement or, if the entitlement is otherwise satisfied, then by exchange.

By excluding these lands from Native conveyances, this procedure will be in conformity with 43 CFR 2650.3-1(a), which provides for the exclusion from Native conveyances [of] entries which are being maintained in compliance with laws leading to the acquisition of title. Contrary to the conclusion which was drawn in my opinion of Nov. 28, 1977, these open-to-entry leases are analogous to entries made under the Alaska homestead, trade and manufacturing site, homesite, and headquarters site laws which permit entrymen a certain period of time (usually five years) to perfect their notices of entry and thereby gain title to the land. * * * Because we are excluding from Native conveyances entries which have been noted on the public land records for homesteads, Native allotments, trade and manufacturing sites, and headquarters sites, but which have not been perfected, lands under open-to-entry leases which have been properly issued by the State should likewise be excluded from Native conveyances.

On Dec. 4, 1978, the Board directed the parties to file within 30 days from receipt of the order briefing on Secretarial Order 3029. More than 30 days have elapsed since receipt of this Order by all parties to the appeal and no briefing has been filed.

In a companion case, *Appeal of State of Alaska*, 3 ANCAB 129, 86 I.D. 45 (1979), the State appealed the inclusion by BLM of a number of open-to-entry leases in the conveyance of Ninilchik Natives Association, Inc. Included in these leases was ADL 41074, the subject of the present appeal, held by the appellant's father, William C. Robinson.

[1] In *Appeal of State of Alaska*, *supra*, the Board found that pursuant to the policy of the Department of the Interior as set forth in S.O. 3029 and the Memorandum of the Solicitor adopted by S.O. 3029 as the policy of the Department, open-to-entry leases issued prior to the passage of ANCSA must be excluded from lands conveyed to village corporations pursuant to the Settlement Act.

That ruling is dispositive of this appeal. The Board hereby reaffirms its ruling in *Appeal of State of Alaska*, *supra*, that appellant's open-to-entry lease, ADL 41074, must be excluded from the conveyance to Ninilchik Natives Association, Inc.

It is unnecessary to remand the appeal to BLM for further action because the remand covering the same lease was ordered in *Appeal of State of Alaska*, *supra*.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
Chairperson, Alaska Native Claims Appeal Board.

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

APPEAL OF JAMES E. BEDELL*

3 ANCAB 153

Decided *January 31, 1979*

Decision of the Alaska State Office, Bureau of Land Management AA-6685-B, 43 FR 14545 (1978) reversed in part.

1. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

Pursuant to the policy of the Department of the Interior as set forth in Secretarial Order 3029 (43 FR 55287 (1978)), open-to-entry leases issued prior to the passage of ANCSA must be excluded from lands conveyed to village corporations pursuant to the Alaska Native Claims Settlement Act of December 18, 1971, 85 Stat. 688; 43 U.S.C. §§ 1601-1611 (Supp. V, 1975).

APPEARANCES: James E. Bedell, pro se; Bruce Schultheis, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

*Not in Chronological Order.

ALASKA NATIVE CLAIMS APPEAL BOARD

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145 (1976), and the implementing regulations in 43 CFR Part 2650, *as amended*, 41 FR 14737 (1976) and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Pursuant to regulations in 43 CFR Part 2650, *as amended*, and Part 4, Subpart J, the State Director is an officer of the United States Department of the Interior who is authorized to make decisions on land selection applications involving Native corporations under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

DISCUSSION

Ninilchik Natives Association, Inc., filed selection application AA-6685-B, for the surface estate of lands located in the Ninilchik area, under § 12(a) of the Alaska Native Claims Settlement Act of Dec. 18, 1971 (85 Stat. 688, 701; 43 U.S.C. §§ 1601-1611 (Supp. V, 1975)) (hereinafter ANCSA).

In the decision here appealed, the Alaska State Office, Bureau of Land Management (BLM) approved conveyance of approximately 70,659 acres of the selected land to Ninil-

chik Natives Association, Inc. This included approximately 68,000 acres properly selected by and tentatively approved in part to the State of Alaska under the Alaska Statehood Act of July 7, 1958 (72 Stat. 339–340; 48 U.S.C. Ch. 2, Sec. 6(b) (1970)) (hereinafter the Statehood Act). The tentative approval previously granted to the State of Alaska was rescinded, and the State's selection applications were rejected, because § 11(a)(2) of ANCSA withdrew, subject to valid existing rights, such tentatively approved lands within the townships withdrawn by § 11(a)(1) for selection by the Native village corporation.

During the period between tentative approval of the State's land selections under the Statehood Act and enactment of ANCSA, the State created certain third-party interests in the lands to which it had received tentative approval. These interests included "open–to–entry" leases, granted under a program which permitted leasing of recreational lands for specified terms, and eventual purchase of the surface estate in such lands at a negotiated price under the provisions of State law. (A.S. 38.05.077)

The appellant is the holder of an "open–to–entry" lease, ADL 55257, on land located in the NW ¼ SE ¼ of sec. 20, T. 2 S., R. 12 W., Seward meridian. The record indicates that the lease was issued on Aug. 13, 1971.

The decision appealed from states:

> The grant of lands shall be subject to:
>
> * * * * *
>
> 5. The following third-party interests, if valid, created and identified by the State of Alaska, as provided by section 14(g) of the Alaska Native Claims Settlement Act of Dec. 18, 1971 (85 Stat. 688, 704; 43 U.S.C. 1601, 1613(g) (Supp. V, 1975)):
>
> a. Open–to–entry leases, including the right of the lessee to exercise the option to purchase the surface estate at a negotiated price under the provisions of A.S. 38.05.77 [sic]:
>
> * * * * *
>
> 13. ADL 55257 located in the NW ¼ SE ¼ of sec. 20, T. 2 S., R. 12 W., Seward Meridian.
>
> * * * * *

In the letter filed as his notice of appeal, appellant states: "I hold the O.T.E. Lease for ADL 55257 and have been fathfully [sic] keeping up with the requirements it entails. I intend to return to Alaska and follow my option to purchase the land before Aug. 1, 1981." This statement was filed May 19, 1978.

Departmental policy on third–party interests as valid existing rights was at that time the subject of a Secretarial Order 3016 dated Dec. 14, 1977. The Order stated in pertinent part:

> Sec. 1 *Purpose.* The purpose of this Order is to resolve for the future certain specific questions which have arisen in the implementation of that Act.
>
> Sec. 2 *Policy.* By this Order I hereby adopt the memorandum from the Solicitor dated Nov. 28, 1977 (copy attached), as the position of the Department on the subject of valid existing rights under

the Alaska Native Claims Settlement Act. I conclude that if prior to the passage of the Alaska Native Claims Settlement Act (ANCSA) lands which were tentatively approved for state selection were conveyed by the State of Alaska to municipalities or boroughs, leased by the State with an option to buy under Alaska Stat. § 38.05.077, or patented by the State under Alaska Stat. § 38.05.077, valid existing rights were created within the meaning of ANCSA. *I also conclude that land covered by such a lease from the State should be included in any conveyance to a Native corporation, but the option to buy will be enforceable by the lessee against the Native corporation. The Bureau of Land Management should identify any third party interests created by the State, as reflected by the land records of the State of Alaska, Division of Lands, and serve notice on all parties of each other's possible interests, but this Department should not adjudicate these interests.* This Order is not intended to disturb any administrative determination contained in a final decision previously rendered by any duly authorized Departmental official. (Italics added.)

* * * * *

However, at the time this appeal was filed, the Secretary was in the process of reconsidering the above-quoted Secretarial Order and had solicited briefs and memoranda from numerous interested parties for review and consideration. Therefore, at the request of the Bureau of Land Management, the Board suspended action on this appeal pending reconsideration of Secretarial Order 3016.

On Nov. 20, 1978, the Secretary of the Interior issued Secretarial Order 3029, which canceled and replaced Secretarial Order 3016 as a statement of Departmental policy on valid existing rights under ANCSA. (43 FR 55287 (1978))

Secretarial Order 3029, in sec. 2 states:

* * * * *

Sec. 2 *Policy.* By this Order I hereby adopt the Memorandum from the Solicitor, dated Oct. 24, 1978, (copy attached), as the position of the Department on the subject of valid existing rights under ANCSA. I reaffirm my conclusion in Order 3016 that, if prior to the passage of ANCSA, lands which were tentatively approved for selection by the State of Alaska were (a) tentatively approved or patented by the State to municipalities or boroughs; or (b) patented or leased by the State with an option to buy under Alaska Statue [sic] 38.05.077 (the so-called 'open-to-entry' program) ; then valid existing rights were created within the meaning of ANCSA. *I also now conclude that lands covered by such open-to-entry leases from the State should not be included in conveyances to Native corporations. The Bureau of Land Management should identify third party interests created by the State, as reflected by the land record of the State of Alaska, Division of Lands, and serve notice on all parties of each other's possible interests, but this Department should not adjudicate these interests.* * * * (Italics added.)

The Solicitor's Memorandum of Oct. 24, 1978, referenced by the Secretary, finds that protection for third-party interests created by the State is provided by ANCSA without reference to common law principles. The Solicitor in discussing the definition of "valid existing rights" quotes § 14(g) and § 22(b) of ANCSA, as well as regulations contained in 43 CFR 2650.3-1(a) as follows:

Sec. 14(g) provides in pertinent part:

Where prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under sec. 6(g) of the Alaska Statehood Act) has been issued * * * the patent shall contain provisions making it subject to the lease contract (etc.) * * *.

Sec. 22(b) directs the Secretary "to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites or small tract sites, and who have fulfilled all the requirements of law prerequisite to obtaining a patent."

43 CFR 2650.3-1(a):

Pursuant to secs. 14(g) and 22(b) of the act, all conveyances issued under the act shall exclude any lawful entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under sec. 6(g) of the Alaska Statehood Act), contracts, permits rights-of-way [sic], or easements.

The Solicitor notes "this regulation makes a basic distinction between rights 'leading to acquisition of title' and 'rights of a temporary nature.' The former are excluded from the conveyance, the latter are included but protected for the duration of the interest."

The Solicitor concludes that Departmental regulations have construed valid existing rights under ANCSA to include rights perfected or maintained under State as well as Federal laws leading to the acquisition of title, noting that third-party interests created by the State can be considered to have been created "under" the Statehood Act, which is a Federal Statute. The Solicitor's memorandum further contains the following discussion of open-to-entry leases:

* * * * *

b. *Open-to-entry Leases.*

The issue of whether or not "open-to-entry" leases are valid existing rights and how they should be processed by the BLM has also been raised.

The State "open-to-entry" leasing program, A.S. 38.05.077, provides for the issuance to qualified applicants a five-year lease (renewable for five years) to not more than five acres of State land classified as "open-to-entry."

It further provides:

"(4) Before a person may purchase the parcel of land upon which he has entered he shall have a survey made of the entry * * *.

* * * * *

"(6) When the entry has been made upon land that has been selected by the State and upon which the State has not received tentative approval or patent, the entry shall be approved only on the basis of a renewable lease. When tentative approval or patent has been received by the State, the lessee may relinquish his lease and acquire patent to the entry by negotiated purchase upon the terms and conditions provided for in this section."

The program contemplated here is a lease with an option to buy at a negotiated price. It is a lease which could at the election of the lessee lead to the acquisition of title.

Under the analysis set forth above, third party interests created by the State are protected regardless of whether they

are of a temporary nature or lead to the acquisition of title. However, for the purposes of 43 CFR 2650.3–1(a), it must be determined whether land covered by an open–to–entry lease should be excluded from the conveyance, or whether it should be included in the conveyance which would be issued "subject to the lease."

After reviewing my original opinion on this issue, I have now concluded that lands subject to open–to–entry leases which were issued prior to Dec. 18, 1971, and which are within a Native selection should not be included in or counted against lands conveyed to Native corporations. Under this procedure the State continues to administer the program in accordance with its laws. If the lessee fails to exercise the option to purchase, the affected Native corporation can either have the land conveyed as part of its original entitlement or, if the entitlement is otherwise satisfied, then by exchange.

By excluding these lands from Native conveyances, this procedure will be in conformity with 43 CFR 2650.3–1(a), which provides for the exclusion from Native conveyances [of] entries which are being maintained in compliance with laws leading to the acquisition of title. Contrary to the conclusion which was drawn in my opinion of Nov. 28, 1977, these open–to–entry leases are analogous to entries made under the Alaska homestead, trade and manufacturing site, homesite, and headquarters site laws which permit entrymen a certain period of time (usually five years) to perfect their notices of entry and thereby gain title to the land. * * * Because we are excluding from Native conveyances entries which have been noted on the public land records for homesteads, Native allotments, trade and manufacturing sites, and headquarters sites, but which have not been perfected, lands under open–to–entry leases which have been properly issued by the State should likewise be excluded from Native conveyances.

On Dec. 4, 1978, the Board ended the suspension of action in this appeal and directed the parties to file within 30 days from receipt of the order briefing on Secretarial Order 3029. More than 30 days have elapsed since receipt of this Order by all parties to the appeal and no briefing has been filed.

In a companion case, *Appeal of State of Alaska*, 3 ANCAB 129 86I.D. 45 (1979), the State appealed the inclusion by BLM of a number of open–to–entry leases in the conveyance to Ninilchik Natives Association, Inc. Included in these leases was ADL 55257, the subject of the present appeal, held by Mr. James Bedell.

[1] In *Appeal of State of Alaska*, *supra*, the Board found that pursuant to the policy of the Department of the Interior as set forth in S.O. 3029 and the Memorandum of the Solicitor adopted by S.O. 3029 as the policy of the Department, open–to–entry leases issued prior to the passage of ANCSA, must be excluded from lands conveyed to village corporation's pursuant to the Settlement Act.

That ruling is dispositive of this appeal. The Board hereby reaffirms its ruling in *Appeal of State of Alaska*, *supra*, that appellant's open–to–entry lease, ADL 55257, must be excluded from the conveyance to Ninilchik Natives Association, Inc.

It is unnecessary to remand the appeal to BLM for further action because a remand covering the same lease was ordered in *Appeal of State of Alaska*, *supra*.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
Chairperson, Alaska Native Claims Appeal Board.

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.

APPEAL OF WILLIAM P. BERGAN, INC.

IBCA–1130–11–76

Decided *February 2, 1979*

Contract No. CX–3000–5–9009, National Park Service

Appeal sustained in part.

1. Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Payments—Contracts: Disputes and Remedies: Damages: Measurement—Contracts: Disputes and Remedies: Equitable Adjustments

Where imponderables make it difficult to arrive at an accurate measurement of the amount of concrete placed under water, the Board finds that the amount represented by "paid for" concrete minus the amount of concrete admittedly wasted is the preferred method for determining the amount to which the contractor is entitled for the concrete so placed.

2. Contracts: Construction and Operation: Actions of Parties—Contracts: Performance or Default: Release and Settlement

Where a contractor voluntarily signs directives specifying the payments to be made for the additional work ordered without taking any exception thereto, the unqualified acceptance of the directives involved is found to be binding upon the contractor to the extent of the direct costs entailed in performance of the additional work.

3. Contracts: Construction and Operation: Drawings and Specifications—Contracts: Disputes and Remedies: Equitable Adjustments

Where the evidence clearly establishes that the Government specifications were defective in a number of respects but fails to show that many of the costs claimed are attributable to actions of the Government, the Board—noting that it is impossible to determine the amount to which the contractor is entitled with mathematical exactness—finds that the "jury verdict" method of determining the amount of the equitable adjustment is the most appropriate method in the circumstances presented by the instant appeal.

APPEARANCES: Mr. Melvin I. Primoff, Attorney at Law, Primoff & Primoff, New York, New York, for the appellant; Mr. E. Edward Wiles, Department Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE GILMORE

INTERIOR BOARD OF CONTRACT APPEALS

Contract No. CX 3000–5–9009 was executed by appellant and the National Park Service on Dec. 13, 1974, appellant's bid of $192,535 having been the lowest of those received in response to an advertised solicitation (IFB). The purpose of

the contract was to stabilize the Tonoloway Creek Aqueduct at the C & O Canal National Historical Park near Hancock, Maryland. One hundred working days[1] were allowed after receipt of notice to proceed for completion of the contract. A preconstruction conference was held on Jan. 14, 1975 (Exh. A–33).[2] The notice to proceed was handed to appellant on Feb. 4, 1975, at the initial site conference (AF Tab C). The Government allowed appellant 30 days in which to order materials before the official start of the contract period. The first working day charged was Mar. 11, 1975, although the work count started on Mar. 7, 1975 (Exh. A–7). The time count was suspended from Apr. 24 through June 6, 1975, and on July 17 and 18, 1975 (Exh. A–7). The contract time was extended 50 days under various directives given during the contract period. The contract time count was stopped on Mar. 23, 1976, the 158th day of work (Exh. A–8; AF Tab D). Because the contract ran 8 days beyond the allowed contract time, appellant was assessed $2,000 in liquidated damages (8 days at $250/day). Appellant filed various claims against the Government by letter dated May 28, 1976 (AF Tab F). After a meeting and further correspondence, the contracting officer issued his final decision by letter dated Oct. 8, 1976, allowing $2,208, a fraction of the amount claimed for Class S concrete, and denying all other claims (AF Tab H). Appellant timely appealed. The Board will decide both entitlement and quantum.

Part I. Introduction

The Tonoloway Creek Aqueduct is an old stone "bridge" over a creek. The bridge at one time carried the C & O canal, and a towpath, over Tonoloway Creek. However, approximately 130 years had taken its toll of the aqueduct (the "bridge") and by 1974 the National Park Service found that the banks of the canal had collapsed and fallen into the creek (Exh. A–3), that many stones had cracked and fallen out of the arch, that a stone buttress had collapsed (AF Tab A, Plan Sheet 3), and that there was a danger that the sides of the aqueduct would collapse outward or the arch would fall apart and cause the entire structure to fall into the creek.

Thus, the National Park Service made a survey of the creek under and near the aqueduct and hired an engineering firm, Green Associates, Inc., to examine and describe the stones of the lower portions of the abutments of the bridge (Site Survey, Exh. A–4). Finally the Federal Highway Administration

[1] Working day is defined at p. D–1 of the contract, Special Provisions, sec. 101—*Definitions and Terms.*

[2] Abbreviations used:
Exh.—Exhibits introduced at the hearing.
AF—Appeal File documents.
Tr.—Transcript of the hearing.
AOB—Appellant's opening brief.

prepared plans for the National Park Service for the "stabilization" of the bridge (AF Tab A). The stabilization scheme was to spray shotcrete (a mixture of sand and cement) on that part of the old stone bridge where the buttress had collapsed, to put 12 big curved steel "ribs" under the bridge to hold it up, to construct a steel and wood "cage" around the whole structure and fasten it to the steel ribs and to tie the whole "cage" around the old stone bridge by drilling holes through the bridge, putting tension rods through the holes and bolting together the rods, cage, and ribs. Also new mortar would be put between the old stones in certain areas. Finally the old bed of the canal would be repaired by the placement of dirt and gravel between new timber walls or sides which would replace the old stone walls. The towpath on top of the aqueduct would also be dismantled and then put back together after the canal bed had been repaired (AF Tab A, Plan Sheet 11). During the stabilization process the contractor would also build two concrete pilasters. These were to be half columns, or small buttresses, of cast-in-place concrete which would strengthen the north (upstream) side of the bridge near the western (lower) abutment, and each pilaster would contain the end points of three tension rods which would go through the stone bridge from one side to the other to keep it from falling apart sidewise. The construction of these pilasters and the supports for the ends of the steel ribs required the use of two different kinds of concrete, above ground concrete which was called "class A," and underwater concrete which was called "class S."

The work to be performed under this stabilization contract was described (1) on certain drawings or plans, (2) in certain "special provisions," and (3) in a book entitled *Standard Specifications For Construction of Roads and Bridges on Federal Highway Projects, FP–69 1969.* The contractual provisions were set forth in these three documents and various standard forms for construction contracts, for example, 23–A, Oct. 1969 edition. Payment was to be made in accordance with 15 pay items.

Part II. The first and fourth causes of action (Class S concrete)

The first and fourth causes of action, also referred to as "claims," relate to the measurement and payment for class S concrete (concrete used underwater), and the retention of contract monies by the Government upon completion of the project.

Payment for class S concrete was stated in the bid and contract to be at the rate of $2,000 per cubic yard (AF Tab A, p. E–2).

These two claims are made up of various elements and amounts as follows:

288–716—79——2

Element No.	Quantity	Dollars	Reference
1	1.104 c.y.	$2,208	AOB p. 5 par. B1 (c.o. determined that this amount was owed to appellant for class S concrete).
2	1.898 c.y.	3,796	AOB p. 39 (added concrete claimed for west abutment and pilaster No. 1).
3		500	AOB p. 5 par. B2 (withheld by Govt. for unstated reason from Progress Estimate 11).
4		2,000	AOB p. 5 par. B2 (retained by Govt. from Progress Estimate 11 due to assessment of $2,000 for 8 days lateness).
Totals:			
(1 & 2)	3.002 c.y.	6,004	AOB p. 43 (for class S concrete).
(3 & 4)		2,500	(withheld contract monies).

Findings and conclusions. Class S concrete.

The appellant filed a claim by letter dated May 28, 1976, which included a claim for $4,000 or 2 c.y. of class S concrete (AF Tab F). The contracting officer (C.O.) in his final decision dated Oct. 8, 1976, said that the IFB estimated this concrete at 8 c.y., that field measurements during performance showed 8.79 c.y., and that the claim was for 10.798 c.y., that project records showed 11 c.y. ordered but that some waste occurred. The C.O. upon obtaining more data, recomputed the amount used as 10.08 c.y., an increase of 1.104 c.y. or $2,208, and thereafter, in his final decision, allowed $2,208.

On July 11, 1975, 11 c.y. of class S concrete were delivered and 10.8 c.y. were placed in the form for the west abutment shoring support (Exh. A–30, paid bills and delivery receipts for 11 c.y. class S concrete, H. B. Mellott Estate, Inc.; Tr. III–69, 70). On Oct. 15, 1975, 1 c.y. of class S concrete was placed for pilaster No. 1 (Exh. A–30, paid bills and delivery receipts for 1 c.y. class S concrete, H. B. Mellott Estate, Inc.).

Mr. Bergan, appellant's president, testified that of the 11 c.y. of class S concrete delivered on July 11, 1975, 10.8 c.y. were placed in the form.[3] Of the 1 c.y. of class S concrete delivered on Oct. 15, 1975, the entire cubic yard was placed in the form without waste. Mr. Ralph

[3] Mr. Bergan testified that 2/10 c.y. hardened in the tremie and was wasted (Tr. II–103, 104).

Wright, the Government's project engineer, in his entry for Oct. 15, 1975, makes no reference to waste with regard to placement of the class S concrete (AF Diary #4; Exh. A–24, delivery receipts).

[1] Sec. 109.01 of FP–69 entitled "Measurement and Payment" sets forth various provisions governing payment of materials furnished and work performed under the contract, providing in general that "[t]he methods of measurement and computation * * * will be those generally recognized as conforming to good engineering practice * * *." It further provides that "structures will be measured according to neat lines shown on the plans or as directed to fit field conditions." The method of measurement for concrete is set forth on p. 241 of FP–69, sec. 601.14 and specifies that "[c]oncrete will be measured by the cubic yard in accordance with the dimensions shown on the plans or ordered and accepted."

The evidence shows that the Government admittedly had difficulty in taking precise and accurate measurements of the concrete placed under water,[4] that the field measurements failed to account for the spaces between the stones (Tr. I–105), and that the dimensions used in the computations were based on an average (Tr. III–72). Because of the imponderables which made it difficult to arrive at an accurate field measurement, we find that the "paid for" concrete, minus the estimated two–tenths c.y. wasted, was the preferable method of measurement and payment for concrete under the circumstances presented herein, and thus should have been the "directed" method of measurement (compare note on page 35 of Exh. A–9 regarding class A concrete). We, therefore, conclude that appellant is entitled under bid item 601(7) to payment for 11.8 c.y. of class S concrete at $2,000/c.y., or $23,600. Appellant, having received payment of $17,596 (Exh. A–9, Pay Estimate No. 11, p. 3), is entitled to $6,004 plus interest in accordance with the payment of interest clause of the contract.

The withholding of $2,000 of contract monies by the Government as liquidated damages will be discussed under Part IV, *infra*.

Part III. The third cause of action (Directives and Additional Steel)

The third claim is for $1,249.48 (AOB p. 51) for the additional costs in performing directives 1 through 5, and for additional steel required to fabricate struts whose lengths were allegedly changed by the Government. From examining schedules K through P of Exh. A–34, the claimed amounts are as follows:

[4] See comment in contracting officer's final decision (AF Tab H, p. 7) on the difficulty of getting accurate field measurements of rock face under water.

Directive	Amount paid under directives	Schedule of Exh. A–34	Claimed balance
1. (drain pipe)	$925.80	K	$89.38
2. (pack joints)	5,610.00	L	119.67
3. (remove rock)	669.96	M	25.08
4. (lower "sides")	431.99	N	11.18
5. (blocking)	11,346.01	O	345.82
No Directive for steel claim (struts)	---	P	658.35
Total			1,249.48

These small claims require decision of substantial legal issues: the effect of accepting a force account document providing for a "lump sum" or "unit price" payment (Directives 1 and 2), and the interpretation of force account payment provisions.

The subject directives authorized payment to be made under contract pay item No. 109(1), which covers "extra and miscellaneous work (subsec. 109.06), contingent sum, $20,000."

Sec. 109.06 (of FP 69 at p. 63) states that, "Whenever the bid schedule contains a contingent sum pay item or items, the work covered thereby shall be performed only upon written order of the Engineer and payment will be made as provided in the order."

The "Special Provisions" on page D–6 of the contract, supplement sec. 109.06 of FP–69 as follows:

109.06 is supplemented to provide that work covered in the contingent sum pay item will consist of the following described work which is not otherwise provided for in the plans and specifications but which is necessary to complete the improvement planned:

1. Temporary erosion control measures, subsection 107.12.

2. Additional stabilization of northwest wingwall.

3. Foundation grouting at west abutment.

4. Other minor items of work not covered by regular items of the contract.

This work will be paid for under Item 109(1), Extra and Miscellaneous Work (subsec. 109.06).

When appellant began work, rain flowed along the old canal, onto the aqueduct, and out of the spaces where the stone walls of the aqueduct had been before falling into the creek (Exh. A–3). Water was also running through the structure itself (AF Diary #1, Mar. 19, 1975). It is clear that something had to be done if work was to proceed on the contract.

The Government decided to install 60 linear feet of 15–inch concrete pipe approximately 100 feet west of the aqueduct (AF Diary #1, Mar. 20, 1975). This work was done Mar. 25–27, 1975 (Exh. A–35; AF Diary #1, Mar. 25, 26, 27, 1975). On Apr. 1, 1975 the Government issued "Directive No. 1" describing the work and providing

payment therefor in a lump sum of $925, and allowing 3 days increase in contract time. On the next day Mr. Bergan, appellant's president, signed the directive where it said, "Please acknowledge agreement to this directive * * *" (AF Tab B).

[2] Sec. 109.04 on p. 60 of FP–69 entitled Force Account Work specifies that force account work "will be paid for at the unit prices or lump sum stipulated in the order authorizing the work, *or* the government may require the Contractor to do such work on a force account basis" (italics added) in accordance with the subsecs. 109.04 (a) through (g).

Payment for work performed pursuant to Directive No. 1 was to be made in a "lump sum" payment of $925 as stated on the face of the directive (AF Tab B). By voluntarily signing Directive No. 1, without taking exception thereto, appellant is deemed to have unconditionally accepted the terms of the directive. The record clearly indicates that the directive accurately reflected the agreement and understanding between the parties as to the work to be performed, the amount of compensation to be paid and the number of days allowed for performance of the work.[5] We find that both the project engineer who issued the directive and the president of appellant company who accepted the directive had actual authority to bind the Government and appellant, respectively; and that appellant's unqualified acceptance of Directive No. 1 was a binding agreement as to the direct cost to be paid for performing the additional work.[6]

In addition, we question the claim for payment of work under work days June 20, and Apr. 8, 1975, noted in Schedule K of Exh. A–34 since appellant's president testified that work under the directive had been completed prior to his signing the directive on Apr. 2, 1975 (Tr. II–106, 107), and no record of the work appeared in Engineer Wright's diary (Exh. A–5). We will not dwell on this point, however, since we find in any event that the "agreement" encompassed all work performed under the directive, whether completed before or after acceptance of the directive by the appellant. The Government, having satisfied its obligations under the directive, is not liable to the appellant for the additional amounts claimed. The claim under Directive No. 1 for $89.38 is denied.

The parties found that there were much deeper spaces between the stones of the aqueduct than anticipated which made the originally planned "pointing" of these spaces excessively expensive (Tr. 24). Thus, they agreed on a method of "dry-packing" the spaces before doing the "pointing," which would achieve the same end result at a considerable savings to the Government.

[5] Part IV will deal with claims for delays wherein we find that Government-caused delays occurred which were not satisfied or "released" by the various directives.

[6] *Cf. Merritt-Chapman & Scott Corp., et. al. v. United States*, 198 Ct. Cl. 223 (1972).

This work was performed. Mr. Bergan agreed to Directive No. 2 at a "unit price" per bag of cement. The directive was signed by both the Government and the appellant.[7] For the same reasons given in our discussion under Directive No. 1, appellant is bound by the agreement and the claim under Directive No. 2 in the amount of $119.67 is denied.

Directive No. 3 was issued by the Government on July 21, 1975, and signed by appellant 2 days later. It provided for the removal of rock at the east abutment to allow placement of the steel ribs. Payment was to be on a force account basis per "invoice prices" (AF Tab B). This signified that the parties agreed that payment for the force account work would be according to the provisions set forth in FP-69, sec. 109.04(a) through (g).

The $25.08 difference between payments made and the $695.04 claimed appears to be due to a change by the contractor in its equipment rental rate from $1.05/hour to $2/hour and a 15 percent mark-up on equipment. (Compare Exh. A-6 and Exh. A-34, Schedule M.)

We find that appellant and the Government agreed upon $1.05/hour for the rental rate of the Ford van (see Exh. A-6, Daily Force Account Statements signed by authorized representatives of both parties) and that appellant accepted payment for work under Directive No. 3 on the basis of that rate, no protest having ever been voiced.[8]

Sec. 109.04 provides that the equipment rental rates shall be paid at the rate agreed upon in writing prior to the start of work. Although no agreement was made prior to the start of work, there was certainly an agreement during the time of performance as evidenced by the written daily statements signed by the parties. With regard to the claim of 15 percent mark-up for equipment, sec. 109.04 of FP-69 states that "[n]o percentage shall be added to equipment rental rate * * *." The claim for $25.08 under Directive No. 3 is denied.

There is nothing in the appeal record indicating the basis for appellant's claim of an additional $11.18 for work performed under Directive No. 4. Because appellant has failed to prove this claim, it is denied.

With regard to the cost of work performed under Directive No. 5 and the amendment thereto, appellant has been paid $11,346.01 and is claiming an additional $345.82.

The amendment to Directive No. 5 (signed by appellant's president on Mar. 1, 1976) incorporates the terms originally set forth in Directive No. 5 unless otherwise changed. Appellant, by signing and acknowledging acceptance of the amendment was, in fact, accepting Directive No. 5 in its amended form. The legal implications of appellant's failure to sign Directive No. 5 became a moot issue upon appel-

[7] AF Tab B.

[8] Appellant signed the daily force accounts statements which indicated the rental rate on the face of the documents taking no exception thereto at that time; appellant took no exception to this item at the time of payment under Pay Estimate No. 11, nor did appellant include this in its initial claim to the contracting officer.

lant's acceptance of the terms in the amendment.

The additional cost claimed appears to be due to the alleged rental rate of $2/hour for the Ford van and a 15 percent mark-up on equipment. We find that appellant agreed to the rental rate of $1.03/hour for the use of the Ford van and is bound by that agreement. As previously discussed under appellant's Directive No. 3 claim, mark-ups on equipment rental rates are not allowable under the contract terms. (See sec. 109.04 of FP-69.) The claim under Directive No. 5 in the amount of $345.82 is denied.

We find no liability on the part of the Government for the cost of additional quantities of steel used by appellant on the project since appellant was aware on Apr. 22, 1975, when Change Order No. 1 was executed (shop drawings were submitted in Feb.) that the steel was being paid for on a lump-sum basis and not by unit prices as ordered. Appellant did not protest or complain but accepted and signed Change Order No. 1 on that basis, all facts having been in at that time. (See also Exh. A-15 dated Feb. 27, 1975.) Appellant's claim for $658.35 for additional steel is denied.

Part IV. The second cause of action (Delay costs due to defective specifications)

The major part of appellant's appeal is the $71,706 claim in the second cause of action. Here appellant asserts that the plans and specifications were defective and misleading (AOB pp. 6-37). Appellant alleges that the following contract defects caused the delay encountered in performance of the contract:

(A) The drainage for the project was inadequate (AOB p. 7).

(B) There was numerous errors in dimensions and elevations in the plans (AOB pp. 8 *et seq.*).

(C) The arch shoring (the construction and placement of the steel ribs) scheme was defective (seven reasons cited) (AOB p. 11).

(D) The scheme to place the dirt, etc., on top of the aqueduct was disrupted by the delays to the arch support and the correction of defects in the plans for the "walls" or bulkheads on the top of the aqueduct and the imposition of a weight restriction which previously had been ignored by the Government (AOB pp. 29-31).

The Government's position, as stated in the answer, is a general denial plus the affirmative defenses of lack of notice under clause 2 of SF 23A (specifications and drawings)[9] or clause 23 (suspension of work).

The Government in some of its evidence contests the appellant's contention that work had to be performed in a certain chronological order; it also asserts that certain work was done inefficiently or too slowly with insufficient and poorly organized personnel, that appellant was delayed by its own inexcusable failure to submit data that was a prerequisite to necessary Government approvals, that the Govern-

[9] "In case of discrepancy * * * the matter shall be promptly submitted to the Contracting Officer * * *."

ment timely approved appellant's shop drawings for the steel ribs, that appellant acted promptly on verbal orders (which later became Directive No. 5) and later unreasonably delayed work while insisting on a written Directive No. 5 (blocking).

From the record on the whole, we find that the contract was defective and misleading in many instances. First, the scheme for stabilization neglected to control the water in the canal. Secondly, the drawings contained erroneous dimensions so that field measurements necessarily took longer than appellant reasonably estimated from the bid package. Thirdly, the bid package indicated that the steel arches (ribs) would be uniform in shape and elevation. Fourth, the plans neglected to provide for removal of part of the ledge at the east abutment. Fifth, the plans were defective as to the construction of the bulkheads (or "walls") and had to be corrected. Sixth, the scheme as to diamond drilling, the pilasters and the location of the lagging was incomplete and misleading and had to be corrected. Seventh, the bid package was erroneous as to the shape of the stones of the west abutment and the form for the underwater concrete there had to be changed. Eighth, the package was misleading as to the necessary capacity of the temporary jacks. These, and the weather, were the major causes of the delays which extended the performance period of this contract and eventually led to the assessment of liquidated damages. We will discuss each of these separately.

The bid, and contract package contained plans and specifications for a scheme to fabricate 12 curved steel ribs. Those ribs would then be slid under the aqueduct and jacked up by temporary jacks until they were a few inches from the stone arch. Then 2-inch by 4-inch wooden "lagging" would be placed between the steel ribs and the aqueduct and finally the ribs would be jacked up as permanent support for the aqueduct (AF dwgs. G-6580, G-6581). However, as soon as the appellant came to the site to start work he discovered that rain and other water was flowing down the old canal to the aqueduct and flowing over and through the old structure so that it was often impossible to perform the contract work. This constituted a type two differing site condition.[10] The Government recognized this problem and corrected it by issuing Directive No. 1 which was a supplemental agreement that paid for the direct cost of correcting the defect. We find that the time extensions and costs allowed under Directive No. 1 for correction of the drainage problem did not include the costs incurred by appellant with respect to delays incident to that change. The delay costs of which appellant complains were not satisfied or "released" upon appellant's signing of the directive. The "Differing Site Conditions" clause does not allow recovery for prechange delays incident thereto.

[10] *Phillips Construction Co., Inc. v. United States*, 184 Ct. Cl. 249 (1968).

Such costs are recoverable, however, under the Suspension of Work clause.[11]

We find that appellant was slightly delayed in its work progress prior to the change since the evidence shows that the back-up of water caused by the inadequate drainage prevented appellant from proceeding with the initial phases of work. Boards have consistently held that strict compliance with the 20-day notice provision is not necessary where the Government was quite aware of the operative facts giving rise to the claim.[12] Before Directive No. 1 was issued by the Government, the project engineer recorded in his project diary several instances where work was delayed due to the water problem and that appellant was paying its laborers "show-up" time (AF Diary #1). We find that appellant is entitled to damages stemming from office and field expenses during the delay.

The contract contemplated that there would be 15 working days to "monitor arch" between nodes 2 and 5 on the CPM chart (Exh. A-17). The parties intended that appellant would "verify dimensions" for the steel before ordering it (note on G-6580), and as to MC 6 x 18 struts the "contractor should verify lengths in field before ordering material" (G-6577), and note "dimensions shown [on G-6575] of the existing structure [the aqueduct and abutments] which affect proposed new construction should be verified in the field."

Appellant alleges that the following errors were found in the Government's dimensions:

(1) On Government drawing G-6575 as compared to appellant's shop drawing 2436-1 (Exh. A-11):

(a) an error of 4¼ inches in the dimension from the keystone to the west abutment

(b) an error of 5¼ inches in the dimension from the keystone to the east abutment

(c) an error of .87 feet in the elevation between the downstream keystone and the west springline

(d) an error of .425 feet in the elevation between the downstream keystone and the east springline.

(2) On Government drawing G-6575 as compared to a later Government drawing submitted to appellant (Exh. A-15):

(a) an error of .51 feet in the elevation of the downstream keystone

(b) an error of .31 feet in the height of the upstream keystone elevation as compared to the downstream keystone elevation

(c) the width of the structure at elevation 413.8 is .4 feet narrower at the west end and .45 feet narrower at the east end.

(3) On Government drawing G-6580 as compared to appellant's shop drawing 2436-1 (Exh. A-11):

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[11] Clause 23, Standard Form 23-A (Oct. 1969 Ed.). The "Changes" clause as prescribed for use in 1968 allows recovery for prechange delays but only if the change was caused by defective specifications. Delays connected with other types of changes are recoverable under the "Suspension of Work" clause (32 FR 16268 and Appendix.)

[12] *See Hartford Accident and Indemnity Company*, IBCA-1139-1-77 (June 23, 1977), 84 I.D. 296, 77-2 BCA par. 12,604.

(a) an error of 1 foot, 9¾ inches in the radius of the west segment of the steel ribs

(b) an error of 2 feet, 9¾ inches in the east segment of the steel ribs (AOB, pp. 8, 9, 10).

The Government does not refute the alleged errors in the dimensions asserted by appellant, but contends that because appellant was required by the contract to verify field measurements, it was on notice that time would be needed for this, that differences would be found, and thus, should have accounted for these contingencies in its bid price.

Experience has dictated that some degree of difference will more than likely be found in any field measurements taken by different persons at different times. The issue, therefore, is the degree of difference or tolerance which should be reasonably expected under the circumstances presented here. Any damages arising from errors beyond the acceptable tolerance are compensable under the "changes" clause of the contract.[18]

In an analogous case, the Navy supplied "guidance plans" for the construction of a ship, and the specification required the contractor to check those plans and correct any errors in them. But the ASBCA held that the Navy had to pay for the delay and disruption (and certain added work) caused by the discovery of errors in the Navy plans. (*Bethlehem Steel Co.*, ASBCA 13341 (Nov. 19, 1971), 72–1 BCA par. 9186.)

Mr. Bergan, appellant's president testified that, in this case, he considered "$\frac{1}{10}$ of a foot" to be the acceptable tolerance (Tr. I–35), adding on p. 44 of Tr. II that "you can fluctuate by one digit of your last numeral in the number." Mr. Sanders, a civil engineer with the Federal Highway Administration who was responsible for the contract plans, testified that although he used fractions rather than decimals, 6⅜ inches would, in his opinion, allow a variance of plus or minus another eighth of an inch (Tr. III–124). In this particular case, the Board finds the reasonable tolerance to be plus or minus 1 inch, since in most instances "inches" is the smallest unit of measurement shown on the Government plans.

We find that appellant was inconvenienced and delayed as a result of the many field verifications that were made to secure the proper measurements prior to ordering materials. The errors found by appellant were beyond the tolerance this Board considers to be reasonable. The Government is, therefore, liable for the added cost incurred as a result of these defective specifications.

We find that Mr. Bergan reasonably interpreted language on drawing G–6581 to mean that temporary jacks need only exert 7½ tons force to properly place the steel ribs. Although the jacking tonnage specified in the contract referred to the

[18] In *H. W. Caldwell and Son, Inc.*, IBCA–824–2–70 (May 30, 1973), 80 I.D. 345, 73–2 BCA par. 10,069, the Board found for appellant where the Government required unreasonable tolerances in the specified grading.

permanent jacking,[14] it was reasonable for appellant to assume that the temporary jacking would require less exertion than the permanent jacking since more structural weight is shifted to the permanent jack, which supplies the main thrust to the ribs and the arch structure (Tr. III–108). However, appellant found after several attempts to perform the work as set forth on the plans, that the 7½ ton capacity specified was not sufficient (Tr. I–117, Tr. II–145). Appellant was delayed while it located 50–ton jacks and used them in lieu of the 12–ton jacks which it had originally obtained to use in the temporary jacking process. The Government introduced no evidence to show that the capacity specified in the contract was adequate. The Government acquiesced in the jacking method chosen by the appellant, and did not provide the assistance and clarification appellant had requested in this regard (Tr. III–162, 163). We find that appellant is entitled to damages resulting from the delays encountered in attempting to comply with the Government plans as written and in locating the jacks needed to perform the work.

The Government plans were defective in the arrangement of the wooden walls (or bulkheads) shown on G–6577. The Government had to and did correct this defect by issuing Directive No. 4 (AF Tab B). This directive covered the change itself but did not account for the delays which were incidental to the change. We find that some delay in the sequence of work and productivity occurred for which the Government is liable.

The Government scheme of construction was incomplete as it related to the construction of the pilasters, the diamond drilling through the aqueduct and the sequence of construction of the steel ribs, the lagging, the tie–rods, and the heavy structures on top of the aqueduct. For a substantial period of time the Government did not enforce the load limit set out in Special Provision 105.13 "no construction loads will be allowed on the aqueduct in its present condition * * *." It later restricted the loads appellant could put on the aqueduct. Further the Government's design was unclear as to the timing and interrelationship between the construction of the pilasters, the diamond drilling and the placement of the wooden lagging on top of the steel ribs. The contractor had to change the pilasters from class A concrete to at least partially class S concrete. The lower tie-rod had to fit over the steel ribs between parts of the lagging. The ends of the tie rods had to be located within 2 inches of a vertical line through their ends. Thus it became necessary to locate the bottom tie-rod when about one–fourth of the lagging was done, drill the holes with the diamond drill, then complete the pilasters and the rest of the lagging. This caused some change in sequence of

[14] See *Suggested Shoring Construction Sequence* at upper lefthand corner of drawing G–6581 (AF Tab A).

work and lengthened the proper performance time for the contract. This was not the fault of the contractor. It resulted from the misleading details in the Government's design.

The Government's design was also erroneous in its details of the shape of the foundations for the west abutment (Dwg. G–6581). The foundation was more complex in shape than shown on the Government plans and this complexity required appellant to build a bigger form and pour more concrete than it had reasonably estimated. Thus, appellant had to spend more time than it had reasonably planned to do this work.

The final major defect in the Government design was the omission of wooden blocking needed to support the aqueduct. Drawing G–6578 sec. B–B states, "Blocking at missing stones (6″ x 8″ min.)" with an arrow pointing to a place where a stone is missing. Likewise drawing G–6577, upper half, has a note "Block out over rib at missing stonework (6″ x 8″ min.)" and an arrow pointing to a place where stonework is missing. These notes are *not* related to the blocking that was required and was added by Directive No. 5. The Government had to correct the omission of certain blocking because of the elevation and twist of the aqueduct. This blocking was necessary to fit between the lagging and the aqueduct. It was necessary so that the steel ribs would support the aqueduct.

The Government issued this change order verbally on Oct 8, 1975 (AF Tab H, C.O.'s final decision), but did not issue it in writing until Dec. 10, 1975. The Government complains that appellant, although starting on the work in November (Exh. A–6) did not fully perform this added work pursuant to the verbal order but after a certain period of time insisted on a written directive. We conclude that the appellant's conduct was reasonable under the circumstances. It was the Government's design that was defective. Thus, it was the Government's duty to both pay the costs caused by the defects and to correct those defects. The changes clause gives the Government the contractual right to change the plans and specifications and the contractor has no right to refuse such added work even though it may be added work which it had not planned or scheduled. The Government if it chooses to exercise this right should do so in accordance with the Changes clause—issue a change order in writing within a reasonable time. Certainly, a contractor is not expected to continue working indefinitely without written authorization. The Government's omission of this blocking from its drawings and its unreasonable delay in issuing a written change order were major causes of

delay to this project, for which appellant should be compensated.[15]

Appellant alleges that because of the various delays and interferences caused by the Government, it was pushed into working during the winter where severe weather caused it to suspend work on several occasions.

With regard to appellant's suspension of work from Feb. 6, through Mar. 14, 1976 (Exh. A–7), we find that Government-caused delays were the reasons the suspension became necessary. Appellant could not have contemplated at the time of bidding that the work would be prolonged to this extent. With regard to other delays allegedly due to bad weather, they are denied since appellant has failed to show that the weather encountered was unusually severe. In any event, it is clear that not all of the delays can be attributed to actions of the Government.[16]

The Government has questioned the timeliness of appellant's delay claims which resulted from the discovery and correction of defective specifications. We find that appellant was timely in its claim of damages in this regard since it was not until very late in the contract that appellant came to realize the detrimental effect such delays were having on its performance. It was the accumulation of these delays that brought appellant to question their effect on the project.[17]

We find that appellant notified the Government within a reasonable time after ascertaining the nature and extent of the claim. We further find that the 20–day notice provision set forth in the "Changes" clause is not applicable to defective specifications.[18]

Equitable Adjustment under Part IV

[3] With regard to the delay damages under the second cause of action, appellant has clearly established that the Government's specifications were defective in a number of respects. It has failed to show, however, that many of the costs claimed are attributable to actions of the Government (Exh. A–34 and Exh. A–30). The record also shows that (i) the causes of delay were overlapping in many instances, (ii) Government-caused delays were intertwined with delays caused by the appellant, (iii) on many days claimed, work was "slowed" rather than "stopped," and (iv) contractor inefficiency was not taken into consideration by appellant.

The Board finds that unknown factors and imponderables make it impossible to determine with math-

[15] *Luria Brothers and Co., Inc.* v. *United States*, 177 Ct. Cl. 676 (1966).

[16] The record shows that appellant exercised unreasonably tight supervision over its workers to the point that the project often slowed down while workers waited for directions, that on many occasions the job was not adequately manned, and that appellant often chose more difficult and time consuming methods of performance than was necessary.

[17] *Cf. Power City Construction & Equipment, Inc.*, IBCA–490–4–65 (July 17, 1968), 75 I.D. 185, 68–2 BCA par. 7126.

[18] Standard Form 23–A, October 1969 Ed., clause 3, par. (d).

ematical exactness the amount to which appellant is entitled. Because appellant did not show with definite certainty the exact amount of loss due to these delays, and because the "total cost" method is rejected by this Board for the various reasons stated above, we find that the "jury verdict" method of determining an equitable adjustment is the most appropriate under the circumstances presented herein. There is some evidence which we deem sufficient for this purpose.[19]

With regard to the assessment by the Government of liquidated damages in the amount of $2,000, we find that although the Government was generally accommodating in its extension of contract time due to various excusable delays which occurred throughout the contract, the Government did not recognize some of the delays, to which we have addressed ourselves above, as being caused by the Government. A contractor may not be assessed liquidated damages arising from excusable delays including acts of the Government.[20] We find that the delays for which the Government was responsible amounted to 8 days beyond those time extensions previously allowed by the Government.

We find that under the second cause of action appellant is entitled to an equitable adjustment in the amount of $20,000 and that the contract time should be extended by 8 additional days.

[19] *WRB Corp.* v. *United States*, 183 Ct. Cl. 409 (1968).

[20] *Larco-Industrial Painting Corp.*, ASBCA 14647 *et al.* (Apr. 27, 1973), 73-2 BCA par. 10073.

Interest

The contract contains under its provisions the clause entitled "Payment of Interest on Contractor's Claims." In addition, therefore, to the equitable adjustment, interest should be paid thereon in accordance with this clause.

Summary

Appellant is entitled to the monies withheld by the Government upon completion of the contract, an 8-day time extension, the sum of $6,004 for class S concrete (this includes the $2,208 determined by the C.O. to be due but was not paid), and the sum of $20,000 for delay costs due to defective specifications. All other claims are denied. The question of interest is remanded to the contracting officer for determination of the amount to be paid pursuant to the payment of interest clause.

BERYL S. GILMORE,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

LEE S. BIELSKI

39 IBLA 211

Decided *February 8, 1979*

Appeal from the decision of the New Mexico State Office of the Bureau of Land Management, dismissing appellant's protest against the impending

issuance of an oil and gas lease to the second drawee (NM 30886).

Reversed and remanded.

1. Evidence: Generally—Oil and Gas Leases: Applications: Generally

Where an oil and gas lease offeror fails to respond within a prescribed period of time to an order to submit specific information necessary to determine whether his offer is valid, it is appropriate to reject the offer.

2. Administrative Practice—Evidence: Generally—Oil and Gas Lease Applications: Generally

Where a protestant against the issuance of an oil and gas lease supports his allegations that the lease offer is not qualified with sufficient evidence to warrant further inquiry or investigation by BLM, the protest should not be summarily dismissed for failure of the protestant to make positive proof of his allegations. Instead, the protest should be adjudicated on its merits after all available information has been developed.

3.Administrative Authority: Enforcement of Criminal Violations—Office of Hearings and Appeals

The Board of Land Appeals, in its adjudication of appeals to determine rights of parties to receive or preserve interests in Federal lands, has a concomitant obligation to preserve the integrity of the process, and where it appears to the Board that the administrative record of a case contains strong evidence of multiple violations of 18 U.S.C. § 1001 (1976), the Board will refer the matter with its recommendation that an investigation be initiated to determine whether criminal charges should be brought.

APPEARANCES: R. Hugo C. Cotter, Esq., Albuquerque, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

On May 23, 1977, the New Mexico State Office of the Bureau of Land Management (BLM), conducted a drawing of simultaneously filed oil and gas lease offers. Four thousand, nine hundred and two offers were filed for one of the parcels included in that drawing, *i.e.*, Parcel NM-704. Three drawing entry cards for this parcel were drawn to establish priority of consideration of the lease offers represented by the respective cards. The drawees, in order, were:

(1) Tina A. Regan, 5000 Hollywood Blvd., Hollywood, FL 33021,

(2) Lucy Allen Dohn, 1888 Century Park E., 6th Floor, Los Angeles, CA 90067,

(3) Lee S. Bielski, 5035 Klingle St., NW., Washington, DC 20016.

The Regan offer, having first priority, was rejected for the reason that the card was improperly dated. On appeal to this Board, the rejection was affirmed. *Tina A. Regan*, 33 IBLA 213 (1977). This cleared the way for adjudication of the offer filed by the number two drawee, Lucy Allen Dohn.

However, on Mar. 22, 1978, R. Hugo C. Cotter filed a formal protest against the issuance of the lease to Dohn. Cotter, an attorney, declared that he had filed a card for Parcel NM-704, although his card had not been drawn. It was, and is,

Cotter's contention that Dohn's card falsely represented that she was the sole party in interest in the offer and any lease issued pursuant thereto; that Dohn was in fact a client of a leasing service, Leland Capital Corp. (LCC), whose contract with Dohn provided for a "security interest" in any lease Dohn might be awarded "to secure payment of any advance rentals paid by LCC on Client's behalf"; that this invested LCC with an "interest" in every offer filed by LCC on behalf of its clients, as defined in 43 CFR 3100.0–5 (b); that the failure to disclose this interest and file the statements required by 43 CFR 3102.7 disqualified the offer and mandated its rejection; that other LCC clients also filed offers for parcel NM–704 in which LCC had the same "security interest," and therefore LCC had an interest in multiple filings for that parcel in violation of 43 CFR 3112.5–2, requiring rejection of all cards filed for that parcel by LCC clients, including Dohn's. Cotter further asserted that, as LCC was Dohn's agent, rather than a mere amanuensis, the failure to file the separate statements required by 43 CFR 3102.6–1 was a violation of that regulation.

In support of this protest, Cotter submitted a blank copy of the contract form allegedly in use by LCC at the time Dohn contracted for LCC's services. This specimen contract contains the "Security Interest" clause as its par. 3.

Subsequently, Lee S. Bielski, the number three drawee, adopted the contentions argued by Cotter and filed her own protest against the issuance of the lease to Dohn.

BLM responded to the Cotter/Bielski protests by calling upon Dohn to furnish additional evidence. Action on the protests was deferred. Dohn responded to the order to supply further information by stating that her business address was % Leland Capital Corp. at the corporation's office, that she had selected the parcel which was the subject of her offer, that she had personally signed the drawing entry card after the offer was formulated, and that her card was dated by her after the offer was formulated. Leland Capital Corp., by its vice president, submitted what purported to be a machine copy of its notarized contract with Philip H. Dohn, Jr. and (Mrs.) Lucy Allen Dohn. Executing the contract on behalf of Leland Capital was its representative, whose signature appears to read "Stephen Z. Flynn." The contract is dated in its preamble "this 26th day of April 1977." The contract is acknowledged by one Deborah Lile, Notary Public, who twice dated her acknowledgement "April 26, 1977."

The machine copy of the contract between Leland Capital and the Dohns was on a different form than the specimen contract submitted by Cotter, and did not contain the "security interest" clause. The letter transmitting the machine copy of the Dohn contract to BLM was signed by Leland Capital Vice President Paul R. Colacecchi, and asserted, "Leland Capital Corpora-

tion has no interest in any leases won by the clients." This letter is dated May 10, 1978.

After BLM's receipt of the Dohn statements, the Colacecchi letter and the machine copy of the purported service contract between Leland Capital and the Dohns, BLM issued separate decisions dated June 15, 1978, dismissing the protests of Cotter and Bielski. Cotter, acting on behalf of both protestants, then requested reconsideration of those decisions on the ground that the information furnished by Leland Capital and Lucy Allen Dohn was false and fraudulent. His allegations at that point are set out verbatim, as follows:

1. *The Service Contract on which the Decision was based is False and a Fraud on the United States.*

The Leland Capital Corporation Service Contract which you used to arrive at your decision, a copy of which is attached, was purportedly signed by the parties and notarized on April 26, 1977, some 22 days prior to Dohn's submission of an Entry Card on the captioned lease. It bears the acknowledgement of California Notary Public Deborah Lile who asserts that the Dohn's personally appeared before her on April 26, 1977 and signed the contract. The notary's seal shows that her Commission expires August 9, 1981. Under Section 8204 (Government) of the California Annotated Codes, a copy of which is attached both in its original form and as amended a Notary's commission has a term of four (4) years and this has been true as you can determine from the copy of the statute at least since 1934. This means that Deborah Lile obtained her commission as a Notary Public on August 10, 1977, *more than three months after she allegedly notarized the Dohn signatures.* It cannot be argued that she may have been a Notary Public on April 26, 1977, under a previous commission since if that were the case her seal would have to show an expiration date in 1977 as provided in Section 9207 (Government), a copy of this statute as amended also being attached. It is indisputable that if the Dohn's ever did actually sign the Service Contract sent to you, it had to be after August 10, 1977. Since Lucy Allen Dohn's entry card is dated May 18, 1977, the agreement sent to you could not have been in effect at the time she made an offer to lease. Since she did not within the prescribed time submit a copy of her true agreement with Leland Capital she should be disqualified on that ground alone. The false notarization is a crime in California and the attempted fraud on any agency of the United States of America should bear investigation.

2. *The Actual Service Contract between Lucy Allen Dohn and Leland Capital Corporation had to be executed on the Form submitted with my Protest.*

Through March, 1978 the only Service Contract from [*sic*] supplied by Leland to its customers was the one attached to my protest. As late as March 13, 1978, it was the only such form of contract in existence as more fully appears from the Affidavit of Billie Hall attached hereto.

3. *That the Form of Service Contract Falsely claimed to have been signed by Lucy Allen Dohn on April 26, 1977 was not printed until almost one year later.*

During the Spring of 1978 Joe Schutz of Schutz Abstract Company, Santa Fe, New Mexico, was employed by Leland Capital to assist in the preparation and review of a form of Service Contract which did not violate sole party in interest regulation and the result was the form submitted to you as signed April 26, 1977, as more fully appears from my affidavit attached hereto.

Lucy Allen Dohn has submitted to you a false Service Contract, *fraudulent on*

its face without outside evidence necessary to show the fraud. Reconsideration of her submission must require her offer to be dismissed and the captioned lease offered to Lee S. Bielski, third party holder. [Italics in original.]

In support of these contentions Cotter supplied his own affidavit concerning his interview with Joe Schutz, an affidavit by one Billie Hall, attesting that Leland Capital has presented to her the form of contract containing the "security interest" clause on Mar. 13, 1978, and copies of California statutes relating to the term of the office of a notary public.

Upon receipt of the foregoing, BLM vacated its dismissal of the Cotter/Bielski protests and issued another decision dated July 17, 1978, calling upon Dohn to supply certain additional information. The decision, addressed to her at the office of Leland Capital Corp., recited the allegations made by Cotter in his motion for reconsideration of his protests, and required Lucy Allen Dohn to submit the following information:

1. Certified proof from the State of California that Deborah Lile was a Notary Public on April 26, 1977.

2. The date Deborah Lile's commission expired, if it expired in 1977.

3. The date it was renewed and the next expiration date.

4. Explain how the contract submitted by the offeror was in existence at the time the offer was filed.

The statements must be filed within thirty (30) days from receipt of this Decision. In the event, the statements are not filed within the time allowed, this offer to lease/application will be considered finally rejected and closed.

* * * * *

The only response was a letter from an attorney, Gary E. Gleicher, whose law office letterhead bears the same address as Leland Capital Corp., the pertinent portion of which is as follows:

I am writing this letter on behalf of Mr. and Mrs. Phillip Dohn in response to your request for additional information regarding the Service Contract between LUCY ALLEN DOHN and LELAND CAPITAL CORPORATION, hereinafter "LELAND".

Mr. and Mrs. DOHN became clients of LELAND on April 26, 1977. On that date, they executed a valid Service Contract with LELAND and issued a check to LELAND in the amount of $2,000.00 as consideration for said agreement. A copy of said check is attached hereto for your reference.

On April 18, 1978, your office requested evidence of the Service Agreement between LELAND and LUCY ALLEN DOHN. A thorough search of LELAND's files revealed that the original contract had been misplaced. In an attempt to comply with the regulations and requirements of the Bureau of Land Management, on April 26, 1978, a duplicate contract was prepared, executed by the DOHNs and notarized by Ms. DEBORAH LILE.

Due to a clerical error, the word "Duplicate" was omitted from the prepared copy of the contract. Further, when the document was given to Ms. LILE for notarization, she inadvertently affixed the date April 26, 1977 instead of April 26, 1978, the accurate date of notarization. Coincidentally, the date of the original statement and the date of the notarization were exactly one (1) year apart, which may explain why Ms. LILE inadvertently affixed the incorrect date.

Mr. and Mrs. DOHN and LELAND have made every effort to comply with the requirements of the Bureau of Land Management, and, by this letter, it is my intention to clear up any confusion which has resulted in regards to this matter. In

reviewing the facts, I find the above to be true and correct.

* * * * *

Not only is the foregoing totally unresponsive to the requirement for the specific information called for by BLM's decision of July 7, 1978, we regard it to be of extremely dubious credibility.

A copy of the Gleicher letter was provided to Cotter by BLM. Cotter responded by pointing out that Gleicher's letter failed to provide any of the information required, and did not dispute the sworn evidence previously submitted by Cotter "that a different and defective agreement was in use by Leland Capital in 1977." Cotter further questioned whether the explanation that the notary had "inadvertently" affixed the date Apr. 26, 1977, below her signature also served to explain why that date had been typed in the body of her acknowledgement as well. Cotter also queried why, if Gleicher was the Dohn's lawyer, he could not supply his own clients' copy of 1977 contract, even if the Leland Capital copy had been "misplaced."

Nevertheless, by its decision of Nov. 6, 1978, BLM again dismissed the Cotter/Bielski protest "on the basis that this office cannot accept your statements as positive proof of the allegations made."

Cotter has abandoned his protest on his own behalf in favor of asserting it on behalf of his client, Lee S. Bielski. In that capacity he has filed this appeal from BLM's dismissal of Bielski's protest. A copy of the appeal was served Lucy Allen Dohn at her address of record (the LCC address), but she has not responded.

Appellant's statement of reasons is focused on the fact that the BLM decision of July 17, 1978, required Lucy Allen Dohn to submit four specific items of information within 30 days, failing which her "offer to lease/application will be considered finally rejected and closed." Appellant points out that none of the required information was submitted, that the reply from Dohn's attorney was nonresponsive to the decision, and that the time set by BLM for compliance has long since expired. Therefore, appellant contends, BLM should have implemented its own decision, rejected Dohn's offer and issued the lease to her. We agree.

[1] Where an oil and gas lease offeror fails to respond within a prescribed period of time to an order directing him to submit specific information necessary to determine whether his offer is valid, it is appropriate to reject the offer. *Ricky L. Gifford*, 34 IBLA 160, 163 (1978). Even where the lease has issued, the Department may require the lessee to submit additional information to establish that he was rightly entitled to have received it, and if he fails or refuses to respond, the lease may be canceled. *Robert A. Chenoweth*, 38 IBLA 285 (1978), and cases cited therein. The State Office had full authority to require the offeror to submit the additional information it deemed necessary to

determine the offeror's qualifications. *Ricky L. Gifford, supra; Evelyn Chambers*, 31 IBLA 381 (1977); *D. E. Pack*, 30 IBLA 166 (1977). Therefore, when Dohn did not supply any of the information she was required to submit within the time prescribed, her offer should have been rejected, as the BLM order indicated it would be.

[2] Moreover, the State Office erred in dismissing appellant's protest for the reason that his statements and evidentiary submissions could not be accepted as "positive proof of the allegations made." Perhaps the State Office was led into this error by our numerous holdings to the effect that where there is no evidence in the administrative record of a violation by the offeror holding priority, the burden is on the protestant attacking the validity of the offer "to prove" an accusation that there is a disqualifying discrepancy. See, *e.g.*, *Clyde E. Frazier*, 36 IBLA 141 (1978), where the verb "to prove" appears in the headnote in this context, but not in text, which, at 36 IBLA 143, states only that "the burden is on the protestant to submit material evidence of an accusation * * *." *Virginia L. Jones*, 34 IBLA 188, 193 (1978), requires a protestant "to submit competent proof of an accusation * * *," as do a number of earlier decisions. But in *Georgette B. Lee*, 3 IBLA 171, 176 (1971), we held simply that, "[a]bsent an adequate showing of disqualification, a protest alleging disqualification is properly rejected." In *Bruce E. Watkins*, 36 IBLA 168 (1978), we said, "a successful drawee * * * will not be disqualified * * * by reason of unsubstantiated allegations * * *."

Admittedly, the burden of a protestant in such cases has been poorly and imprecisely defined. But insofar as our research reveals, we have never gone so far as to hold a protestant must make "positive proof" of his allegation to avoid dismissal of his protest. We think the rule should be that where a protestant supports his contention with sufficient evidence to warrant further inquiry or investigation by BLM, the protest should not be summarily dismissed, but adjudicated on its merits after all available information has been developed.

In this instance, Cotter not only supplied sufficient evidence to inspire BLM to demand further information from Dohn, he also detected and pointed out to BLM how the submissions from Dohn and LCC were false, and buttressed his contention that Dohn's evidence was manufactured by supplying copies of the relevant California statutes relating to notaries public, and with affidavits. This evidence was the basis of BLM's second demand on Dohn, so it is apparent that BLM recognized that Cotter's evidence was adequate to create a justiciable issue, which it became incumbent on the Bureau to resolve. But when BLM's further demand for specific material and relevant information was fended off by Gleicher's unre-

sponsive letter, BLM reacted by summarily dismissing the Cotter/Bielski protest, presumably with the intention of issuing the lease to Dohn. This was clearly improper.

[3] This Board is of the opinion that the administrative record strongly indicates multiple violations of 18 U.S.C. § 1001 (1976), which provides:

> § 1001—Statements or entries generally.
>
> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> (June 25, 1948, ch 645, 62 Stat. 749.)

Two items of correspondence sent by BLM to Dohn at the offices of LCC contained express admonitions that the statute, *supra*, makes it a crime to make false, fictitious, or fraudulent representations to a department or agency of the United States. Moreover, the drawing entry card used by Dohn also bears such an admonition.

There can be no gainsaying that the machine copy of the notarized service contract between Philip H. Dohn, Jr., Lucy Allen Dohn, and Leland Capital Corp. was manufactured for the purpose of submitting it to BLM *after* receipt of BLM's demand for a certified copy of the contract between them at the time the Dohn offer was filed. This spurious document was then submitted to BLM by LCC, in response to that order, in such a way that it appeared to be a copy of the original one in force when Dohn's offer was filed.

Likewise, there can be no doubt that the spurious contract was falsely notarized. The text of the notary's acknowledgment reads:

> COUNTY OF LOS ANGELES,
> *State of California, ss:*
>
> On this day, April 26, 1977, before me, a Notary Public in and for the state of California, Phillip and Lucy Dohn personally appeared and executed this document. Witness my hand and official seal.
>
> /s/ Deborah Lile
> Deborah Lile Notary Public
> April 26, 1977 [Handwritten Ed.]
> Date
>
> OFFICIAL SEAL
> DEBORAH LILE
> NOTARY PUBLIC-CALIFORNIA
> LOS ANGELES COUNTY
> My comm. expires AUG 9, 1981 [1]

Thus, the date "April 26, 1977," was entered *twice* by the notary; once in the typewritten text and again in her own hand below her signature. According to Gleicher's "explanation," these entries are simply errors which, by fantastic coincidence, just happen to agree with the alleged date of the original contract, which date is also typed in the first line of the text of the manufactured specimen.

[1] The typeface utilized in the notary's seal, and the border around it, are not susceptible to accurate reproduction here.

The residence address of the Dohns is shown on the spurious copy of the contract to be Atlanta, Georgia. This raises the question whether they journeyed to Los Angeles, Calif., to sign the "duplicate" of their original contract on Apr. 26, 1978. If they did not do so, does the notary's acknowledgement falsely declare that they personally appeared before her? Could the Dohns' signatures be forgeries? The need to explore these questions is increased by yet another startling fact. Gleicher's letter states that the "duplicate" was executed by the parties and acknowledged by the notary on Apr. 26, 1978, which "coincidentally" happened to be the first anniversay of the original contract executed, allegedly, on Apr. 26, 1977, and through error and inadvertence, all the dates on the 1978 "duplicate" were entered as Apr. 26, 1977, and the word "Duplicate" was omitted, so that the instrument appeared to be a copy of a contract executed in 1977, although it was actually done on Apr. 26, 1978. That date, Apr. 26, 1978, also happens to be the same date that BLM's demand for further evidence was delivered to the LCC offices in Los Angeles. BLM's order to produce the contract was dated Apr. 18, 1978, and was mailed by certified mail, *restricted delivery*, to Lucy Allen Dohn at her "business address," at the offices of Leland Capital. There it was received by someone who signed the postal service's return receipt card "Lucy Allen Dohn by D. Wise," on "4–26–78." Thus, if we are to believe Gleicher's explanation, *on that same date* (1) a search was made for the original 1977 contract which could not be found in the business offices of Leland Capital Corp.; (2) a "duplicate" was prepared; (3) Philip H. Dohn, Jr. and (Mrs.) Lucy Allen Dohn, of Atlanta, Georgia, personally appeared in Los Angeles, Calif., were they and the LCC representative [Stephen Z. Flynn?] executed the "duplicate" in the presence of the notary public, Deborah Lile. Lucy Allen Dohn also completed and signed a questionnaire provided by BLM, in which she made various statements of fact concerning the filing of her offer, plus a *third* document, again signed "(Mrs.) Lucy Allen Dohn," in which she declared her "business address" to be that of Leland Capital Corp.

If all of the foregoing events did *not* occur on Apr. 26, 1978, then the incredible "coincidence" of the anniversary date, as described by Gleicher, never occurred, and there is no "explanation" whatever for the submission of a document which purports on its face to be a machine copy of another document allegedly executed *at least* a year earlier, and which did not then exist, according to the affidavits of Cotter and Hall. Interestingly, although the spurious copy of the contract was allegedly prepared and executed, apparently in great haste on the very day BLM's demand was received, Apr. 26, 1978, its submission to BLM was

delayed until transmitted by LCC vice president Colacecchi's letter dated May 10, 1978, and received by BLM on May 15, 1978.

The oil and gas lease in question apparently is of substantial value, as indicated by the fact that it attracted 4,902 offers, and according to a statement filed by Tina A. Regan at the time she appealed the rejection of her first-drawn offer. The information and evidence which BLM required was material to its adjudication of which offeror would be awarded the lease, as all concerned were aware. In its adjudication of appeals to determine the rights of parties to receive or preserve interests in Federal lands, this Board has a concomitant obligation to preserve the integrity of the process. We will not turn a blind eye to such strong evidence of willful fraud as is presented by the record in this case. Accordingly, it is the recommendation of this Board that an investigation be initiated to determine whether criminal action should be instigated. *See United States* v. *Weiss*, 431 F.2d 1402 (10th Cir. 1970).

Therefore, pursuant to the authority delegated to the Board of Lands Appeals by the Secretary of the Interior, 43 CFR 4.1, the dismissal of the Bielski protest is reversed, the oil and gas lease offer NM 30886 of Lucy Allen Dohn is hereby rejected, and the case is remanded with instructions to the New Mexico State Office to consider the offer of Lee S. Bielski.

EDWARD W. STUEBING,
Administrative Judge.

We CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

JAMES L. BURSKI,
Administrative Judge.

INTERPRETATION OF SECTION 603 OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976—BUREAU OF LAND MANAGEMENT (BLM) WILDERNESS STUDY

M-36910 *February 13, 1979*

1. Federal Land Policy and Management Act of 1976: Wilderness

Sec. 603 requires the Secretary to study all roadless areas of 5,000 acres or more and roadless islands with wilderness characteristics, and report his recommendations to the President as to the suitability or nonsuitability for preservation as wilderness of each such area. The Secretary may not make multiple-use trade-offs in determining which public land areas qualify for wilderness study status.

2. Federal Land Policy and Management Act of 1976: Wilderness

For the purpose of BLM wilderness review, the term "roadless" means the absence of roads which have been improved

and maintained, by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.

3. Federal Land Policy and Management Act of 1976: Wilderness

Sec. 603(a) requires that the Secretary report to the President by July 1, 1980, his recommendations as to the suitability for wilderness preservation of all formally identified natural or primitive areas designed prior to Nov. 1, 1975. Only those areas for which a notice of designation was published in the *Federal Register* are subject to this accelerated review and reporting requirement.

4. Federal Land Policy and Management Act of 1976: Wilderness

Sec. 603 of FLPMA does not apply to those areas of the Oregon and California and Coos Bay Wagon Road lands which are being managed for commercial timber production. Sec. 603 does apply to those areas not being managed for commercial timber production.

5. Federal Land Policy and Management Act of 1976: Wilderness

Prior to completion of the initial wilderness inventory and identification of the wilderness study areas, wilderness characteristics must be evaluated before the Secretary authorizes any new activities which would destroy wilderness qualities. Discretionary activities must be conditioned to prevent impairment of an area's potential for wilderness designation.

6. Federal Land Policy and Management Act of 1976: Wilderness

During the review of wilderness study areas, and until Congress acts on the President's recommendations, the Secretary must manage study areas to prevent impairment of their suitability for wilderness designation, with certain limited exceptions.

7. Federal Land Policy and Management Act of 1976: Wilderness

Management of sec. 603 study areas should be guided by the principle that developmental activity must be carefully regulated to insure it is compatible with wilderness, or that its imprint on wilderness is temporary.

8. Federal Land Policy and Management Act of 1976: Wilderness

Sec. 603 provides that mining, grazing, and mineral leasing may continue in wilderness study areas in the same manner and degree as on Oct. 21, 1976, even if impairment of an area's suitability for wilderness results.

9. Federal Land Policy and Management Act of 1976: Wilderness

The words "existing" and "manner and degree" in sec. 603(c) should be read in conjunction with the words "mining and grazing uses" to establish as a benchmark the physical and aesthetic impact a mining or grazing activity was having on an identified or potential wilderness study area on Oct. 21, 1976.

10. Federal Land Policy and Management Act of 1976: Wilderness

The existing mining use exception for mining and mineral leasing is limited geographically by the area of active development, and the logical adjacent continuation of the existing activity, not necessarily the boundary of the particular mining claim or mineral lease on which the operation is located.

11. Federal Land Policy and Management Act of 1976: Wilderness

When the impact from mining and grazing activities on a wilderness study area differs in manner and degree from the impact from such activity on Oct. 21, 1976, the Secretary must regulate the activity to prevent impairment of the area's suitability for preservation as wilderness.

February 13, 1979

12. Federal Land Policy and Management Act of 1976: Wilderness

The word "existing" in sec. 603(c) modifies "mineral leasing" in the same manner as it modifies "mining and grazing uses."

13. Federal Land Policy and Management Act of 1976: Wilderness

The Secretary is vested with the authority and responsibility to regulate all activities in wilderness study areas to prevent unnecessary and undue degradation and to afford environmental protection.

14. Federal Land Policy and Management Act of 1976: Wilderness

Areas under review for designation as wilderness remain available for appropriation under the mining laws, unless withdrawn for reasons other than protection of wilderness.

OPINION BY

OFFICE OF THE SOLICITOR

September 5, 1978

TO: SECRETARY

FROM: SOLICITOR

SUBJECT: BLM WILDERNESS REVIEW—SEC. 603, FEDERAL LAND POLICY AND MANAGEMENT ACT.

I. INTRODUCTION

The Federal Land Policy and Management Act (FLPMA), 90 Stat. 2743, 43 U.S.C.A. § 1701 *et seq.*, (West Supp. 1978) was enacted on Oct. 21, 1976. Beginning in March 1977, several opinions interpreting sec. 603 of the Act, 43 U.S.C.A. § 1782 (West Supp. 1978), have been written in the Office of the Solicitor. This formal Solicitor's Opinion supersedes our previous interpretations of this provision.[1]

It does not, of course, answer all the legal questions that are likely to be raised about sec. 603. In particular, we will prepare a separate opinion on the relationship between sec. 603 and state in lieu or state-

[1] The original opinions were contained in the following memoranda:
—Memorandum to the Director, BLM from the Associate Solicitor, DER on "Formally Identified Natural or Primitive Areas," Mar. 22, 1977.
—Memorandum to the Director, BLM from the Assistant Solicitor, Lands on "Applicability of Wilderness Act, Sec. 4(d)(3) to BLM 'wilderness areas,'" May 4, 1977.
—Memorandum to the Director, BLM from the Solicitor on "FLPMA—Interpretation of Sec. 603—Wilderness," May 23, 1977.
—Memorandum to the Director, BLM from the Deputy Solicitor on "Applicability of Sec. 603 of FLPMA to O&C and Coos Bay Wagon Road Lands," June 1, 1977.
—Memorandum to the Assistant Secretary, Land & Water Resources from the Deputy Solicitor on "Interim Management of Potential Wilderness Areas," July 19, 1977.
—Memorandum to the Assistant Secretary, Land & Water Resources from the Solicitor on "Definition of 'road' for purposes of identifying roadless areas under Sec. 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C.A. § 1782 (Supp. 1977)," Oct. 17, 1977.
—Memorandum to the Director, BLM from the Deputy Solicitor on "Application of Mining and Grazing Laws to Areas under Review for Inclusion into the Wilderness System: Sec. 603, FLPMA," Jan. 9, 1978.

hood selections of public land, and between sec. 603 and Native selections under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* (Supp. V 1975). But it does chart a general course for interpreting this section.[2]

Sec. 603 of the FLPMA states:

(a) Within fifteen years after the date of approval of this Act, the Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by [sec. 201(a)] of this Act as having wilderness characteristics described in the Wilderness Act of September 3, 1964 (78 Stat. 890; 16 U.S.C. 1131 et seq.) and shall from time to time report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness: *Provided*, That prior to any recommendations for the designation of an area as wilderness the Secretary shall cause mineral surveys to be conducted by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present in such areas: *Provided further*, That the Secretary shall report to the President by July 1, 1980, his recommendations on those areas which the Secretary has prior to November 1, 1975, formally identified as natural or primitive areas. The review required by this subsection shall be conducted in accordance with the procedure specified in section 3(d) of the Wilderness Act.

(b) The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendations with respect to designation as wilderness of each such area, together with a map thereof and a definition of its boundaries. Such advice by the President shall be given within two

[2] For convenient reference, the following is an outline and table of the contents of this opinion:

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years of the receipt of each report from the Secretary. A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress.

(c) During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of this Act: *Provided*, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection. Unless previously withdrawn from appropriation under the mining laws, such lands shall continue to be subject to such appropriation during the period of review unless withdrawn by the Secretary under the procedures of section 204 of this Act for reasons other than preservation of their wilderness character. Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated areas, including mineral surveys required by section 4(d)(2) of the Wilderness Act, and mineral development, access, exchange of lands, and ingress and egress for mining claimants and occupants.

The legislative history reveals that the wilderness review provision was included in FLPMA to further the purpose underlying the Wilderness Act, 16 U.S.C. § 1131 *et seq.* (1970), by mandating a review of the public lands for wilderness values and giving Congress an opportunity to act to protect appropriate areas of the public lands.

The Wilderness Act itself specifically directed the Forest Service to review only those areas previously classified as primitive areas or contiguous to existing primitive areas.[3] It was silent on review of Forest Service roadless areas outside of primitive areas. The Secretary of Agriculture thereafter directed the Forest Service to institute an inventory of all its lands to identify other areas suitable for inclusion in the National Wilderness Preservation system.[4] The first Forest Service roadless area review (RARE I) began in 1967 and ended in 1973. This review generated considerable controversy and some litigation about appropriate wilderness review criteria and procedures.[5] A second review (RARE II) was instituted in 1977 and is nearing completion. Although the Forest Service's RARE provides a backdrop for the wilderness review pro-

[3] *See Parker* v. *United States*, 309 F. Supp. 593 (D. Colo. 1970), *aff'd.* 448 F. 2d 793 (10th Cir. 1971), *cert. den. sub nom Kaibab Industries* v. *Parker*, 405 U.S. 989 (1972).

[4] *See* McCloskey, "The Wilderness Act of 1964: Its Background and Meaning," 45 Oregon L. Rev. 288 (1966).

[5] *Sierra Club* v. *Butz*, Civil No. C–72–1455; 3 Env. L. Rep. 20071, (N.D. Cal. 1972); *Wyoming Outdoor Council* v. *Butz*, 484 F. 2d 1244 (10th Cir. 1973). *See* Robinson, "Wilderness: The Last Frontier," 59 Minn. L. Rev. 1 (1974).

vision of FLPMA, it is plain from sec. 603 that Congress intended to vest BLM with a distinct review obligation of its own.

The introductory language of the Wilderness Act refers to all Federal lands. The Act itself, however, establishes wilderness review requirements only for Department of the Interior–managed lands within National Parks, Wildlife Refuges, and Game Ranges.[6] Despite the lack of express statutory authority, the Secretary set aside by administrative action certain public lands as "primitive areas," and management of these areas was virtually the same as for lands formally a part of the National Wilderness Preservation System.[7] At least one such primitive area designation was challenged as invalid because of the lack of an affirmative statutory base, but the court never reached the merits.[8]

Congress' response to the recognized need for a comprehensive public lands wilderness review is FLPMA's sec. 603. It supplies the affirmative statutory base for review and protection of BLM–managed lands suitable for designation as wilderness, in accordance with the provisions of the Wilderness Act.[9] The review it mandates is designed to further the objectives of the Wilderness Act itself, 16 U.S.C. § 1131 *et seq.* (1970). Yet there is neither a substantial overlap, nor a substantial inconsistency, between the *review* mandated by sec. 603 and the Wilderness Act. Specifically, although the latter contains a limited review provision, it is principally concerned with the management of wilderness areas once they have been designated by Congress. It does not deal directly with the obligations addressed in sec. 603—the review of BLM lands for wilderness values. And its own limited review provisions do not spell out in nearly the detail that sec. 603 does the review procedures to be followed, and the management protections BLM must provide for areas being inventoried and studied for possible Congressional protection as wilderness. Therefore, while we are aided by the Wilderness Act and the history of its implementation in our search for the proper interpretation of sec. 603, it goes without saying that it is the language and legislative history of sec. 603 itself, enacted 12 years after the Wilderness Act, which must ultimately control.

II. REVIEW PROCEDURES

The wilderness review mandated by sec. 603 of FLPMA is basically a two–step process. The first step is an identification of roadless areas of 5,000 acres or more and roadless islands having wilderness characteristics through the inventory process mandated by sec. 201 of the Act. The Act envisions a profes-

[6] 16 U.S.C. §§ 1132(b) and (c) (1970).

[7] *See* 43 CFR Part 2070 and Subpart 6221; Foster, "Bureau of Land Management Primitive Areas—Are They Counterfeit Wilderness." 16 Natural Resources J. 621 (1976).

[8] *F. H. Stoltze Land & Lumber Co.* v. *Kleppe*, Civ. No. 75–136–M (D. Mont., June 10, 1977).

[9] *See* S. Rep. No. 583, 94th Cong., 1st Sess., 44 (1976).

sional review of all BLM lands to determine which areas meet the three threshold criteria for wilderness areas—roadlessness, wilderness characteristics, and size. This review is to be based solely on the roadlessness and wilderness characteristics of the land, not on multiple-use trade-offs and variables. Full formal wilderness studies are required only on inventoried areas of the required size identified as roadless and of wilderness character; that is, the Department does not have to report to Congress on areas which do not meet the basic criteria.

A. "*Roadless*"

The House Report on the Act[10] states: "The word 'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road." This is the principal recorded guidance in the legislative history about the meaning of roadless.[11] Congress clearly did not want to preclude consideration of an area for wilderness solely because of tracks created by the repeated passage of vehicles alone, and this expression must guide BLM's determination of roadlessness as part of the inventory.

B. "*Wilderness Characteristics*"

The meaning of "wilderness characteristics" is not discussed in the legislative history, but the text of sec. 603 itself refers to "having wilderness characteristics described in the Wilderness Act * * *."[12] Sec. 2(c) of that Act[13] defines a wilderness as follows:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected pri-

[10] H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976).

[11] The transcript of the House Committee markup session reveals that Congressman Steiger of Ariz. suggested the definition of "road" which appears in the House Report. Ariz. is an arid state where "ways" can be created and used as roads merely by the passage of vehicles, and Congressman Steiger took some pains to draw the distinction between a "way" and a "road" for wilderness purposes. The latter, he insisted, was any access route improved or maintained in any way, such as by grading, placing of culverts, making of bar ditches, etc. His express intent was to draw a distinction between what the BLM should do and what the Forest Service had done under the Wilderness Act of 1964, and Congressman (now Senator) Melcher of Montana invited him to submit language for the Committee Report to make the Committee's intent clear. *See Transcript of Proceedings, Subcommittee on Public Lands of House Committee on Interior and Insular Affairs*, Sept. 22, 1975, pp. 329–33.

[12] 43 U.S.C.A. § 1702(l) (West Supp. 1978), which defines "wilderness" as it is used in § 603 as having "the same meaning as it does in sec. 2(c) of the Wilderness Act * * *."

[13] 16 U.S.C. § 1131(c) (1970).

marily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological or other features of scientific, educational, scenic, or historical values.

C. "*Suitability*"

Following completion of the inventory, sec. 603(a) next requires the Secretary to study the suitability of the inventoried roadless areas for inclusion in the Wilderness System. At this point, multiple-use trade-offs addressed by the BLM planning system come into play. Congress envisioned that an area with all of the necessary wilderness characteristics might not be suitable for inclusion in the Wilderness System because of its higher value for some other use, such as commercial forest management or mineral development. In fact, before the Secretary can recommend that an area be included in the Wilderness System, Congress directed the Secretary to "cause mineral surveys to be conducted by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present in such areas * * *."[14] The formal wilderness suitability study must also be conducted in accordance with sec. 3(d) of the Wilderness Act, 16 U.S.C. § 1132(d) (1970), regarding public participation.[15]

D. *Report to Congress*

After studying each area, the Secretary reports to the President his recommendation as to the "suitability or nonsuitability of each such area * * * for preservation as wilderness."[16] The President in turn must advise Congres of his recommendation on each such area, within two years of receipt of the recommendation of the Secretary.[17] Essentially, the Secretary and the President merely advise Congress, since only Congress can designate wilderness areas.[18] Reports must be made to Congress both on areas recommended for inclusion in the wilderness system and on areas viewed as unsuitable and therefore not recommended for inclusion.

E. "*Instant*" *Study Areas*

Sec. 603(a) requires that the Secretary report to the President by July 1, 1980, his recommendations on areas which were formally identified as natural or primitive areas prior to Nov. 1, 1975. This accelerated review provision is derived from the House version of FLPMA. The House Report[19] lists 13 formally designated primitive and natural areas. In fact, the Bureau has, through withdrawals, classifications and other means, created approximately 147 natural areas. Fifty-six of these areas were created by publishing a final notice in the *Federal*

[14] § 603(a), first proviso.
[15] § 603(a), last sentence.
[16] § 603(a).
[17] § 603(b).
[18] The last sentence of § 603(b) states: "A recommendation of the President for designation as wilderness shall become effective only if so provided by an act of Congress."
[19] H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17-18 (1976).

Register with natural area management as the stated purpose, objective or title.

According to BLM procedures for designation of primitive and natural areas, publication of notice in the *Federal Register* completes the process of formal designation. (BLM Manual, Part 2070) Therefore, only natural and primitive areas for which a *Federal Register* notice was published will be considered "formally identified" for the purpose of accelerated wilderness review.[20]

F. *Special Exemptions and Exceptions*

The wilderness review requirements of sec. 603 do not or may not uniformly apply to all BLM-managed lands.

1. *Islands.* Although sec. 603(a) generally requires that only roadless areas 5,000 acres or larger be studied, it also requires that all roadless islands, no matter what their size, must be studied. Even though there are over 5,000 public land islands in the East and Midwest, most of which average only an acre in size, each one which is roadless must be evaluated to determine whether it has wilderness characteristics.

2. *O&C Lands.* Sec. 603 has limited application to the Oregon and California Railroad and Coos Bay Wagon Road revested lands (the so-called "O&C Lands"). This exception is created by sec. 701 (b) of FLPMA, which provides as follows:

> (b) Notwithstanding any provision of this Act, in the event of conflict with or inconsistency between this Act and the Acts of August 28, 1937 (50 Stat. 874; 43 U.S.C. 1181a–1181j), and May 24, 1939 (53 Stat. 753), insofar as they relate to management of timber resources, and disposition of revenues from lands and resources, the latter Acts shall prevail.

The legislative history of FLPMA sheds little light on the reason for the inclusion of this specific reference to the O&C Act of Aug. 28, 1937, in this section.[21]

[20] Applying this standard, the natural and primitive areas subject to the accelerated review requirement are listed in Appendix A to this opinion.

[21] The language first appeared in Committee Print No. 5 of H.R. 5441 (93d Cong., 2d Sess. 1975), but was not discussed during the Committee mark-up of the print. The language was retained in H.R. 13777 when it was introduced in the 94th Congress. S. 507, the Senate bill which ultimately became FLPMA, made no reference to resolution of inconsistencies between FLPMA and the O&C Act. Although the House provision was included in the Conference Committee print, it was not discussed during meetings of the Conference Committee, nor mentioned in its report. H. Rep. No. 1724, 94th Cong., 2d Sess. (1976).

The effect of this provision was discussed by members of Congress and the Department during consideration of earlier proposals. The Dept. of the Interior, in both letters and testimony at Subcommittee hearings, sought to assure the Oregon delegation that the BLM Organic Act would not affect the funding formula or management of the O&C lands. *See* Hearings on S. 424 before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 93d Cong., 1st Sess. at 44–45 (1973) and letter from Asst. Secretary Loesch to Senator Hatfield, Sept. 15, 1972. It is not clear, however, whether the language first included in the 1975 version of the House bill derived from this earlier testimony and correspondence.

But the terms of sec. 701(b) are clear; wilderness review and identification under sec. 603 of the Act are applicable to the O & C lands only to the extent that wilderness review and management of O & C lands for wilderness is consistent with the O & C Act of Aug. 28, 1937. Sec. 1 of the O & C Act provides as follows:

> Notwithstanding any provisions in the Acts of June 9, 1916 (39 Stat. 218), and February 26, 1919 (40 Stat. 1179), as amended, such portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberlands, and power-site lands valuable for timber, *shall be managed*, except as provided in section 1181c of this title, *for permanent forest production*, and the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilties [sic].

(43 U.S.C. § 1181a (1970), (Italics added.)

This Act mandates dominant use management of the O & C lands for commercial forestry.[22] Rather than allowing equal consideration of all land uses, the O & C Act requires that the lands suitable for commercial forestry be managed principally for that purpose. Other uses, such as recreation, are allowed only when subordinated to commercial forest management.

In order to determine whether wilderness review and management is consistent with the O & C Act, we must determine whether dominant commercial forest management is consistent with the mandatory wilderness review required by sec. 603 of FLPMA. It is settled that timber may not be harvested on lands under review for wilderness designation except in very limited circumstances. *Parker* v. *United States*, 448 F. 2d 793 (10th Cir. 1971); *see also* 36 CFR 293.6 (1976). If sec. 603 applied to the O & C lands, timber could not be harvested until the wilderness review of qualifying roadless areas was completed. Wilderness review of areas on the O & C lands which are managed for commercial timber production is inconsistent with the O & C Act and, therefore, the O & C Act must prevail where the mandatory wilderness review provision of sec. 603 would prevent commercial timber management on the O & C lands.

Congress has recognized, however, that some O & C lands might be unsuitable for timber production. Sec. 701(b) of FLPMA requires the wilderness review provisions of FLPMA to yield only to the extent they are inconsistent with the management for permanent forest production provided for in the O & C Act. This means that the Bureau is not authorized to take an action which would destroy the wilderness

[22] *See, e.g.*, Solicitor's Opinion M-30506, Mar. 9, 1940 (holding that O&C lands could not be withdrawn for inclusion in Oregon Caves National Monument); see also Instruction of the Asst. Secretary, Aug. 25, 1941 (holding that the Mining Law of 1872 did not apply to O&C lands).

quality of an area in advance of reviewing the area's wilderness potential, if the action contemplated—for example, constructing a fish hatchery, campground, or road for recreational purposes—is not in an area managed for commercial timber production. If roadless areas unsuitable for commercial forest management are identified on O & C lands, they must be reviewed pursuant to sec. 603.

3. *OCS Lands.* Lands on the Outer Continental Shelf are not considered public lands under FLPMA, and thus the wilderness review provision does not apply to them. 43 U.S.C.A. § 1702(e)(1) (West Supp. 1978).

III. INTERIM MANAGEMENT OF POTENTIAL WILDERNESS AREAS

One of the more difficult judgments required in the wilderness review process is deciding what activities are authorized on lands being evaluated under section 603 prior to final Congressional action either adding them to the National Wilderness Preservation System or returning them to ordinary multiple use management. Congress addressed this problem in sec. 603(c) of FLPMA quoted on page 93 above.

The language of sec. 603(c) reflects Congress' concern that wilderness review interfere with ongoing multiple use management activities only to the extent necessary to prevent *impairment* of suitability for preservation as wilderness. It allows all management activities to continue, subject only to those constraints necessary to prevent impairment until potential areas are determined not to be roadless or not to have wilderness characteristics, or, for roadless areas with wilderness characteristics, until Congress provides otherwise.[23]

It is worth emphasizing that sec. 603(c) provides only interim management direction to the Secretary. Once the review of BLM-administered lands is complete and Congress determines the ultimate management objectives for the lands which are roadless with wilderness characteristics, sec. 603(c) does not restrain the Secretary's general authority to manage BLM lands, except to the extent BLM lands are included in a statutory wilderness area. Thus, any regulation required by sec. 603 is only temporary, pending further Congressional action. An appreciation of the interim nature of sec. 603 is important to a proper understanding of the provision.

A. *Management of Areas Prior to Inventory*

A threshold question which must be addressed regarding sec. 603(c) is what kind of interim management restrictions should apply to

[23] *See* H. Rep. No. 94-1165, 94th Cong., 2d Sess. at 17-18 (1976).

areas which could possess, but have not yet been determined to have, roadlessness or wilderness characteristics. That is, to qualify for formal study, an area must (a) be an island or contain 5,000 acres or more; (b) be roadless; and (c) have "wilderness characteristics." [24] The question is whether development which would impair the suitability of an area for preservation as wilderness can be permitted in an area before it is determined to be roadless and to have or not have wilderness characteristics.

To state the issue somewhat differently, there is no question that the sec. 603(c) restrictions apply to the identified wilderness review areas. It is also clear that once roadless areas with wilderness characteristics are identified, those areas which lack such characteristics are not subject to the interim management restrictions. The remaining question is how to manage public lands prior to the completion of the initial inventory.[25]

The first sentence of sec. 603(a) says that the review applies to roadless areas "identified during the inventory required by section 201(a) of this Act as having wilderness characteristics * * *." The inventory required by sec. 201(a) is a continuous process, in the words of the Act, to be "kept current so as to reflect changes in conditions and to identify new and emerging resources and other values." [26] The question thus becomes how to merge this continuing inventory requirement with sec. 603's requirement to study potential wilderness areas for possible congressional protection as wilderness. How, in other words, is the inventory process to be carried out in connection with sec. 603?

If the area covered by the proposed action has already been identified in the inventory process as having (or not having) roads or wilderness characteristic, then there is no problem in applying sec. 603. If the area has not been inventoried for roads and wilderness characteristics, then the question is how to mesh the inventory process with sec. 603.

If the BLM contemplates taking or allowing actions which could impair the suitability of an area for preservation as wilderness without having previously determined whether the area is roadless or has wilderness characteristics, it is obvious that the whole purpose of the wilderness review could be defeated. The agency must make those

[24] These determinations need not be made separately and discretely; that is, the presence of "wilderness characteristics" connotes the absence of "roads." Of course, a determination that roads exist in the area will eliminate the need for further inquiry into the presence or absence of wilderness characteristics.

[25] The inventory process itself is to have no effect on BLM policies. Sec. 201(a) states, in pertinent part: "The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands."

[26] § 201(a); 43 U.S.C.A. § 1711 (West Supp. 1978). Congress recognized that the BLM had for years been conducting inventories of the public lands and their resources, and the § 201(a) inventory requirement was designed to be folded into the existing BLM land use planning system. *See, e.g.*, § 202(d), 43 U.S.C.A. § 1712(d) (West Supp. 1978), referring to land use plans in effect at enactment.

threshold determinations before taking actions which could make subsequent inventory meaningless. In short, the agency cannot permit the possible wilderness characteristics to be destroyed before those characteristics have been determined to exist. Otherwise, the objective of sec. 603 would be defeated.

This conclusion finds strong support in a decision involving the Wilderness Act itself. In *Parker* v. *United States*, 309 F. Supp. 593 (D. Colo. 1970); *aff'd.* 448 F. 2d 793 (10th Cir. 1971), *cert. den. sub nom Kaibab Industries* v. *Parker*, 405 U.S. 989 (1972), the land at issue adjoined the Gore Range–Eagles Nest Primitive Area in Colorado. The Forest Service had by contract sold the timber on this adjacent land to a private company for harvesting.[27] As noted earlier in this opinion, the Wilderness Act did not expressly mandate a wilderness study of this land; the Act required the Forest Service to study only the primitive area itself and make a report to the President. But the Act also stated that:

> Nothing herein contained shall limit the President in proposing, * * * the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value. 16 U.S.C. § 1132(b) (1970).

[27] The original decision by the Forest Service to harvest the timber in this area was made prior to enactment of the Wilderness Act of 1964. *See* 309 F. Supp. at 596.

The Court of Appeals began by emphasizing that the general purpose of the Wilderness Act was to acknowledge "the necessity of preserving one factor of our natural environment from the progressive, destructive and hasty inroads of man, usually commercial in nature * * *." 448 F.2d at 795. The Court went on to hold that because the intent of the Wilderness Act was that the President and Congress should have a "meaningful opportunity to add contiguous areas predominantly of wilderness value to existing primitive areas," performance of the timber sale contract should be enjoined to preserve the area for Executive and Congressional consideration for wilderness preservation.[28]

Whenever the BLM contemplates taking or allowing actions which could impair an area's suitability for preservation as wilderness, then, it must first determine whether that area is roadless and has wilderness characteristics. If it does, then the action should be evaluated to determine whether it will necessarily impair the area's suitability for preservation as wilderness, or whether is can be modified or con-

[28] *Id.*, at 797. The Court noted that the language and legislative history of the Wilderness Act reflect a "constant reassurance to lumber, grazing and other such interests" that the Act does not affect their legitimate interests. But the Court pointed out that these assurances were directed to statutorily designated wilderness areas rather than to the study of other areas for possible inclusion in the system. *Id.*, at 796.

ditioned so as to avoid such impairment. (See discussion at pp. 102–122 below.) If impairment cannot be avoided, then the action cannot proceed until the 603 study is complete and Congress has acted on the President's recommendation.

I should emphasize that no delay in decisionmaking should result from this conclusion. In most cases BLM would have to prepare an environmental analysis record (EAR) and an environmental impact statement (EIS), if required, on the proposed action.[29] The sec. 201(a) inventory of roadless areas with wilderness characteristics referred to in sec. 603 can simply be integrated into those NEPA processes. The EAR/EIS should specifically consider whether the area affected by the proposed action lacks roads and has wilderness characteristics and therefore should be formally studied for protection as wilderness. If that determination is made, the Secretary must study and make recommendations to the President on the suitability or nonsuitability of the area for preservation as required, and the interim management guidelines of sec. 603(c) then come into play.

If the inventory process shows that the area in question has roads or does not have wilderness characteristics, then no formal wilderness study is required and the area is free for ordinary multiple use management. Sec. 603 ceases to have any meaning for these areas from the moment that the BLM makes a determination that the area is not roadless or lacks wilderness characteristics.

B. Grazing, Mining and Mineral Leasing in Areas Under Review

1. *Interim Management—FLPMA and the Wilderness Act.* Congress provided in sec. 603(c) that, during the wilderness review process, and until Congress has provided otherwise:

> [T]he Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of this Act: * * *[30]

Congress also provided, in the last sentence of sec. 603(c), that:

> Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated areas, including mineral surveys required by section 4(d)(2) of the Wilderness Act, and min-

[29] *See, e.g., Minnesota Public Interest Research Group* v. *Butz*, 498 F. 2d 1314 (8th Cir. 1974); *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F. 2d 1244 (10th Cir. 1973); *West Virginia Highlands Conservancy* v. *Island Creek Coal Co.*, 441 F. 2d 232 (4th Cir. 1971). In each of these cases, the Courts of Appeal enjoined on-the-ground activities which threatened to impair or destroy wilderness characteristics, prior to the preparation of an EIS.

[30] 43 U.S.C.A. § 1782(c) (West Supp. 1978), 90 Stat. 2743, 2785. The subsec. continues: "*Provided*, That in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection."

eral development, access, exchange of lands, and ingress and egress for mining claimants and occupants.

The initial question is how to interpret and integrate these two standards—the first of which governs management of areas while they are being studied for possible preservation as wilderness, and the second of which governs management of areas after they have been designated as wilderness.

a. *Legislative History.* The "no impairment" language and the grandfather clause which permits impairment for "existing uses" being conducted in the same "manner and degree," subject to the Secretary's other regulatory authorities, were inserted into the Act by the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs in 1975, during the second session of the 93rd Congress. At the time, the Subcommittee was reviewing both H.R. 5441 (the Administration's bill) and a draft bill prepared by the Subcommittee. Neither H.R. 5441 nor the seventh version of the draft Subcommittee bill contained the "manner and degree" language.[31] Sec. 312 of the seventh draft bill, captioned "Bureau of Land Management Wilderness Study" simply stated that, "[d]uring the period of review of such areas, the Secretary shall continue to administer such lands according to his existing authority."[32] Sec. 312 of the eighth version of the draft bill (Sept. 1974) contained the wilderness management language basically as it appeared in the subsequent law. The additional language was inserted at the instigation of Congressman Dellenback, who explained:

> * * * the gentleman from Alaska had raised the question what could be done on lands set aside for wilderness purposes. I would propose * * * this additional phrase: During the period of review of such areas, the Secretary shall continue to administer such lands in a manner so as to preserve the wilderness character of each such area; subject only to the continuation of existing mining and grazing uses in the manner and degree in which the same had been conducted.
>
> We are trying to keep the static, [sic] trying to keep the Secretary from changing anything. That is what I had in mind with this particular language.[33]

The language was expanded to read "existing mining and grazing uses *and mineral leasing* in the manner and degree in which the same was being conducted on the date of the approval of this Act

[31] The previous six versions of the Subcommittee bill had been amended, revised and incorporated into the seventh version of the draft Subcommittee bill.

[32] The draft bill continues: "Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act shall apply with respect to the administration and use of such designated area, including mineral development, in the manner as they apply to national forest wilderness areas."

[33] Hearings on H.R. 5441 before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, U.S. House of Representatives, 93rd Cong., 2d Sess., Sept. 12, 1975 at 1324.

* * *" (italics added) on Sept. 22, 1975 by an amendment to sec. 312 of the draft Subcommittee Print No. 2. There was no discussion concerning the addition of the term "mineral leasing." [34]

The language of sec. 603(c) adopted by the House was described in a later House Committee report as follows:

> While tracts are under review they are to be managed in a manner to preserve their wilderness character, subject to continuation of existing grazing and mineral uses and appropriation under the mining laws. The Secretary will continue to have authority to prevent unnecessary and undue degradation of the lands, including installation of minimum improvements, such as wildlife habitat and livestock control improvements, where needed for protection or maintenance of the lands and their resources and for continuation of authorized uses.[35]

The Senate bill, S. 507, as reported from the Senate Committee on Interior and Insular Affairs one year previously was markedly different from the House bill with respect to the direction and authority given to the Secretary to manage BLM lands under review for inclusion into the Wilderness System. Unlike the House bill, S. 507 contained no separate BLM wilderness review section. Instead, S. 507 did not require the Secretary to change his management of BLM administered lands under study for possible wilderness designation:

> Areas containing wilderness characteristics as described shall be identified within five years of enactment of this Act * * * *the identification of such areas shall not, of itself, change or prevent change in the management or use of national resources lands.*[36]

Sec. 103 of S. 507, captioned "Land Use Plans," discussed the Secretary's management authority during the review process in identical terms:

> Areas identified pursuant to section 102 as having wilderness characteristics shall be reviewed within fifteen years of enactment of this Act pursuant to the procedures set forth in [the Wilderness Act, 78 Stat. 890, 892-893]: Provided, however, that *such review shall not, of itself, either change or prevent change in the management of use of the national resource lands.*[37]

The discussion of these sections in the Senate Committee Report indicated a concern with avoiding arbitrary termination of existing activities and allowing new uses, as well as a desire to prevent

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[34] It should be noted that when "mineral leasing" was added, the remainder of that phrase was changed from the plural "had been conducted" to the singular "was being conducted." One could infer from this that Congress meant the "manner and degree" limitation to apply only to mineral leasing, and not to existing mining and grazing uses, so that the latter arguably could still be allowed even if they changed in "manner" or "degree." This inference is not, however, consistent with the legislative history of sec. 603(c), since "mineral leasing" was added *after* the "manner and degree" language was inserted in the section, and there was no suggestion that a severe limitation on the "manner and degree" formula was intended. The better reading is to attribute it to inadvertent grammatical error.

[35] H. Rep. No. 94-1163, 94th Cong., 2d Sess. (1976), p. 17.

[36] § 102 of S. 507, entitled "Inventory," (94th Cong., 1st Sess.) (Italics added.)

[37] § 103(d), S. 507 (94th Cong., 1st Sess.) (Italics added.)

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the foreclosure of wilderness designation by uses prior to completion of the inventory and identification process:

> Equity demands that activities of users not be arbitrarily terminated or that the Secretary not be barred from considering and permitting new uses during the *lengthy inventory and identification processes* * * *. The Committee fully expects *that the Secretary, wherever possible, will make management decisions which will insure that no future use or combination of uses* which might be discovered as appropriate in the inventory and identification processes—be they wilderness, grazing, recreation, timbering, etc.—*will be foreclosed by any use or combination of uses conducted after enactment of S. 507, but prior to the completion of those processes.*[38]

The Senate version's general grant of ordinary discretionary interim management authority to the Secretary is in sharp contrast to the more specific proscriptions supported by the House.[39] The Conference Committee discussed the conflict between the House and Senate bills at some length.[40] The Conference Committee ultimately adopted the wilderness language contained in sec. 311 of the House bill. The Conference Report does not explain why the conferees selected the House language and no debate on the provision occurred after the Conference in either House.

b. *Discussion.* The Wilderness Act continues the mining and mineral leasing laws in statutorily designated wilderness areas through Dec. 31, 1983. Such mining activities are, however, subject to "such reasonable regulations governing ingress and egress * * * consistent with the use of the land for mineral location and development and exploration * * * and restoration as near as practicable of the surface of the lands * * * as soon as they have served their purpose." Moreover, the mineral leases, permits and licenses must contain "such reasonable stipulations * * * for the protection of the wilderness character of the land

[38] S. Rep. No. 94-583, 94th Cong., 1st Sess. pp. 44-45 (1975) (Italics added.)

[39] As noted above (see Note 25, *supra*), language similar to that in sec. 103 of S. 507 stating that the review "shall not, of itself, either change or prevent change in the management" of the public lands, eventually found its way into FLPMA's sec. 201(a). The language in 201(a), however, refers to the inventory process for all public lands rather than to the review of wilderness study areas, which is how it was used in sec. 103 of S. 507. The general reference in sec. 201(a) to the entire inventory must be read as modified by the specific guidance Congress gave the Secretary regarding wilderness review in sec. 603(c). Otherwise, the first sentence of sec. 603(c) has no meaning. *See also* pp. 105-111, *infra*.

[40] For example, Senator Haskell noted, "We don't want people going in [to areas under review for wilderness classification] and increasing the activity during the study period, do we?" Transcript of Proceedings, U.S. Senate Conference Committee on S. 507 at 66 (Sept. 20, 1976). And later during the meeting, Senator Haskell set forth his preference for the House version: "I am in favor of protecting all existing uses [on federal lands under review for wilderness classification], but not expanding them or adding new ones * * *." *Id.* at 68. For a discussion in the Conference Committee on what became sec. 603(c), see pp. 48-71 of the Transcript of Proceedings, U.S. Senate Conference Committee on S. 507 (Sept. 20, 1976).

consistent with the use of the land for the purpose for which they were leased, permitted or licensed." Starting Jan. 1, 1984, all such lands are withdrawn from the mining and mineral leasing laws, subject to valid existing rights.[41]

It should be noted that, if BLM lands are added to the National Wilderness Preservation System by Congress, the 1984 withdrawal in the Wilderness Act will apply to them as well,[42] although Congress can decide to apply a different cut-off date for each area, or even ban all mining in them from the outset.

Because mining claims may be located and mineral leasing may continue for a limited period after land has been designated as wilderness, can we reasonably infer that Congress in sec. 603 (c) intended to regulate mining and mineral leasing differently during the review period prior to Congressional action? The answer to this question is not a simple one although, as will be discussed in more detail below (pp. 109–111), there may be no significant differences in fact between standards to be applied during the two periods in question.

The leading judicial guidance on the subject, the *Parker* case, discussed above at pages 101–102, stands for the proposition that an agency's obligation to protect lands during the review process must be viewed separately from the agency's obligation to manage lands which are already part of the National Wilderness Preservation System.

Moreover, where Congress in 1976 has established a different standard for allowing control during the interim period, its directions must be carried out even if subsequent Congressional designation of an area as wilderness may actually change the restrictions.

It is worth noting that Congress has twice recently created "wilderness study areas" on the National Forests, in the eastern United States and in Montana.[43] These Acts directed the Secretary of Agriculture to review particular designated areas to determine their "suitability or nonsuitability for preservation as wilderness * * *" and make recommendations to the President who forwards his or her own recommendations to the Congress. Congress provided, as in FLPMA, that the wilderness areas created by that Act would be managed in accordance with the provisions of the Wilderness Act.

In creating these wilderness *study* areas, however, Congress also provided that they were to be managed "so as to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System until Congress has deter-

[41] 16 U.S.C. § 1133(d)(3) (1970).

[42] The last sentence of § 603(c) provides: "Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act * * * shall apply * * * including * * * mineral development, access, exchange of lands, and ingress and egress for mining claimants and occupants."

[43] *See* Public Law No. 93–622, 88 Stat. 2096, 16 U.S.C. § 1132 Note (January 3, 1975), designating wilderness areas and creating seventeen wilderness study areas in the eastern half of the country; and Public Law No. 95–150, 91 Stat. 1243, 16 U.S.C. § 1132 Note (Nov. 1, 1977) § 3.

mined otherwise * * *." Unlike FLPMA, Congress made no exception for existing uses, but simply flatly commanded that the areas' present character be preserved.[44]

When compared to these Acts passed the year before and the year after, FLPMA embodies a less restrictive approach to interim management, expressly protecting existing mining and grazing uses and mineral leasing. Yet all three statutes could be contrasted with the Wilderness Act, which says nothing of interim protection and allows new mining and mineral leasing to occur, subject to appropriate regulation, until 1984 in statutory wilderness areas.

The legislative history of sec. 603 shows that Congress had the clear opportunity to incorporate the minerals management language of the Wilderness Act into sec. 603(c). The Senate-passed version of interim management restrictions accorded wide discretion to the Secretary to allow mining, grazing, and other uses, possibly incompatible with wilderness, during the review process. The Conference Committee, and ultimately the Congress, rejected this approach, and instead adopted the wholly-new interim wilderness protection proposed by the House. This should be compared with sec. 603(a), which expressly incorporates the review procedure of sec. 3(d) of the Wilderness Act regarding public participation.

Another persuasive indicator of Congress' intent is FLPMA's sec. 302(b), the last sentence of which provides, in pertinent part:

> Except as provided in * * * section 603 * * * and in the [following sentence], no * * * section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress. In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.

The plain import of this partial disclaimer is that sec. 603 might to some degree "amend" the Mining Law or "impair" the rights of claimants under that Act.[45] Sec. 302(b) thus underscores the meaning of sec. 603 by expressly recognizing that mining claimants are subject to regulation to carry out the purposes of sec. 603, apart from whatever operations may be allowed once an area becomes a statutory wilderness area.[46]

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[44] The Montana Act went on to provide that this interim wilderness protection mandate was "subject to valid existing rights."

[45] The reference to "impairment" of claimants' rights, of course, must be read against § 701(h), which makes all actions of the Secretary under the Act "subject to valid existing rights." 43 U.S.C.A. § 1701, Note (West Supp. (1978)).

[46] It should also be observed that Congress expressly recognized that the last sentence of § 302(b)—referring to prevention of unnecessary and undue degradation—also may work an amendment to the Mining Law or an impairment of claimants' rights under that law. That sentence is very similar, although not identical, to the *proviso* in the first sentence of § 603(c), discussed at pp. 116–119, *infra*.

It should also be noted that in a little more than five years (Dec. 31, 1983), no new mining claim may be located or mineral lease issued in statutory wilderness areas. Because BLM has until 1991 to complete the sec. 603 review, we must be careful in comparing the effect of the two Acts. Specifically, Congressional action on the Executive's recommendations for BLM wilderness may not come in many, if not most cases until after the cutoff date under the Wilderness Act. Thus Congress' directive in the last sentence of sec. 603(c) to manage statutorily designated BLM wilderness areas under the Wilderness Act will probably not mean that new mineral leasing or location of mining claims will be allowed in BLM wilderness areas. Finally, it must be remembered that Congress can, in creating new wilderness areas by statute, require more or less stringent restrictions for any particular wilderness area than exist in the Wilderness Act itself.[47]

It has been suggested that Congress must have intended mineral exploration to continue in wilderness study areas unrestricted by sec. 603 because Congress needs to know whether an area is valuable for minerals in deciding whether to create a wilderness area. This ignores the plain requirement of sec. 603(a) that, "prior to any recommendations for the designation of an area as wilderness," the Secretary must have the USGS and Bureau of Mines make mineral surveys "to determine the mineral values, if any, that may be present in such areas." [48] The Congress has in effect demanded that it be informed through these surveys about the mineral character of every study area before it makes a decision whether to protect the area as wilderness. If the surveys show mineral potential exists, for example, Congress can order more study to gather more information about mineral potential, or reject the area as wilderness; and mineral surveys must be made on a "planned, recurring basis" once an area is designated as wilderness. Congress retains the opportunity to withdraw statutory protection for wilderness if substantial mineral potential is subsequently determined to exist. (Of course, minerals information gathered through minerals exploration activity carried out consistent with interim management regulation will also be considered by Con-

[47] For example, the Eastern Wilderness Act specifically authorizes the Secretary of Agriculture to purchase or consider "such lands, waters, or interests therein as he determines are necessary or desirable" to further the management of the areas as wilderness. *See* P.L. No. 93-622, § 6(b); 16 U.S.C. § 1131 (1970), Note.

[48] This requirement in § 603(a) follows the requirement of § 4(d)(2) of the Wilderness Act, that statutory wilderness areas be "surveyed on a planned, recurring basis consistent with the concept of wilderness preservation by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present; and the results of such surveys shall be made available to the public and submitted to the President and Congress." 16 U.S.C. § 1133(d)(2) (1970). This § 4(d) requirement is itself expressly incorporated into § 603(c), which provides that the Wilderness Act shall govern once BLM areas are designated as wilderness, "including mineral surveys required by § 4(d)(2) of the Wilderness Act * * *."

gress in making decisions on each area.)

Given these explicit mechanisms in secs. 603(a) and 603(c) for gathering minerals information, it is obvious that the grandfather clause in 603(c)'s interim protection provision has nothing to do with encouraging mineral exploration so Congress can be better informed when it decides whether to protect an area. Rather, as we shall see below, the grandfather clause in sec. 603(c) has only to do with fairness to those who are currently active in drilling or other forms of mining development (as well as grazing).

The conclusion is inescapable that Congress deliberately chose in sec. 603(c) to direct the Secretary to conform to a specific standard in deciding whether and on what basis to allow development of mining claims and mineral leases in areas being considered for possible protection as wilderness. The treatment of minerals activities in statutory wilderness areas under the Wilderness Act itself provides only limited guidance to the Secretary for interim management. As we shall see in the next section, however, there may not be much difference between interim management of a study area and management of a statutorily designated area.

2. "*Impairment*" *of the* "*Suitability*" *of an Area for Preservation as Wilderness.* The general guidance given to the Secretary for interim management is found in the first sentence of sec. 603(c); namely, that the study areas are to be managed "so as not to impair the suitability of such areas for preservation as wilderness * * *."

Several things can be said about this language. First, clearly any existing or new activity is permissible in a study area if that activity does not impair the suitability of the area for preservation as wilderness. Second, the Wilderness Act itself recognizes that certain activities are incompatible with the preservation of wilderness characteristics, and prohibits these activities in wilderness areas (16 U.S.C. § 1133(c) (1970)):

> Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

Many of the activities described can occur during the study period if they can be effectively terminated without impairment upon a final designation of the area as wilderness; *e.g.*, temporary use of motorized vehicles, landing of air-

craft, etc. However, the provision also gives guidance to determining activities which will impair the suitability for wilderness designation because such activity would be inconsistent with ultimate wilderness management, and its effects cannot be eliminated easily upon designation of the area as wilderness; *e.g.*, construction of permanent roads.

Third, it should be noted that the Wilderness Act's definition of wilderness, incorporated into FLPMA by sec. 603(a), allows some human intrusions into the wilderness landscape, so long as they are not permanent, and the area "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable * * *."[49] The BLM should be guided in part by the kinds of intrusions and activities which occurred in areas before they were placed by the Congress in the National Wilderness Preservation System.

Fourth, as we have seen (see p. 105, *supra*), in enacting the Wilderness Act in 1964, Congress contemplated that mineral development could take place in some circumstances in statutorily designated wilderness areas.[50] Almost by definition this activity could adversely affect wilderness character to some degree,[51] yet Congress has decided that it may be compatible with an area's suitability for preservation as wilderness.

Although Congress has not flatly considered that all developmental activity impairs the suitability of an area for wilderness preservation, it is difficult if not impossible to give meaningful illustrations of types of activities which will or will not impair the suitability of an area for wilderness preservation. For example, commercial timber harvesting has been held to impair[52] and not necessarily to impair[53] wilderness. The nature of the area and the extent of the proposed activity are the controlling factors, and a wise exercise of judgment of land management professionals and Departmental decisionmakers will be required.

Management of sec. 603 wilderness study areas should, therefore,

[49] 16 U.S.C. § 1131(c) (1970).

[50] Although the Wilderness Act contemplates continued mineral leasing and mining claim location in statutory wilderness areas, it is a generally acknowledged fact that mineral development in statutory wilderness areas has been rather limited. One could only speculate about the principal cause of this: possible causes include poor mineral prospects, stringent regulation of proposed mineral operations, and the reluctance of the mining industry to risk adverse public reaction by opening major mining operations in wilderness areas.

[51] In *Izaak Walton League of America* v. *St. Clair*, 353 F. Supp. 698 (D. Minn. 1973), *rev'd* 497 F. 2d 849 (8th Cir. 1974), *cert. denied* 419 U.S. 1009 (1974), the district court held that mineral development is by definition inimical to wilderness. The Court of Appeals reversed, holding that the district court should not have reached the question until the Forest Service had made a decision on defendants' application for a prospecting permit.

[52] *See Parker* v. *U.S.*, discussed *supra*, p. 101.

[53] *See Minnesota Public Interest Research Group* v. *Butz*, 541 F. 2d 1292 (8th Cir. 1976). This case involved a special section of the Wilderness Act dealing with the Boundary Waters Canoe Area (BWCA) which provided that "the primitive character of the area" is to be maintained "without unnecessary restrictions on other uses, including that of timber * * *." *See* 16 U.S.C. § 1133(d)(5) (1970). Because of this special provision, the court found that the BWCA occupied a "unique niche" in the National Wilderness System. *See* 541 F. 2d at 1298.

be guided by the principle that developmental activity must be carefully regulated to insure it is compatible with wilderness. Congress has, in sec. 603 as in the Wilderness Act, provided for the continuation of certain developmental activities within wilderness study areas. Such development proposals must be carefully regulated to prevent impairment, however, and it is possible that in some circumstances development must be prohibited where impairment cannot be prevented or restored. To the extent that activities and their imprint on wilderness are temporary and can be carried on in a manner calculated to minimize interference with wilderness, these activities pose less of a threat to an area's suitability for wilderness preservation than do activities with long-term impact and low rehabilitation potential.

3. *Existing Uses.* The grandfather clause of sec. 603(c), "for existing mining and grazing uses and mineral leasing," [54] will actually have quite limited applicability. Most existing mining uses, for example, already involve roads or such intrusions on the landscape as to destroy an area's wilderness characteristics. Consequently, such areas would not be included in a study area to begin with. Therefore, the grandfather clause will probably apply to a relatively small number of situations.

And it should also be noted again that an activity which does not fall within the ambit of the grandfather clause—*e.g.*, because it is a "new" rather than an "existing" use—may nevertheless be permitted to take place if its intrusions into an area can be mitigated so as not to impair the suitability of the area for preservation as wilderness. Failing to qualify for the grandfather clause does not necessarily spell the end of the activity in a wilderness study area.

In what follows, I set forth what I believe to be the proper interpretation of each key phrase in the clause.

a. "*Mining and grazing*". I conclude that "existing mining and grazing uses" means only activities actually taking place as of the date of the passage of FLPMA. Indeed, any other reading is difficult given the employment of the word "use" rather than "entitlement to use" or "right to use." [55] Any other interpretation would also be inconsistent with the adjective "existing," and the verb "was being conducted,"

[54] The term "grandfather" in this context refers to protection of existing uses in the "subject, however, to the continuation of" clause. As will be discussed below, it does not exempt even existing uses from any regulation, because of the *proviso* immediately following. *See* pp. 116–119, *infra*.

[55] The dictionary defines "use" in several ways, including "the act or practice of using something * * * method or manner of using something * * * a habitual or customary practice * * * a privilege or benefit of using something * * * the ability or power to use something (as a limb or a faculty) * * * the legal enjoyment of property that consists in its employment, occupation, exercise, or practice * * * the quality of being suitable for employment." *See Webster's Third New International Dictionary* (Unabridged) (G. & C. Merriam Co., 1961).

and is also inconsistent with the legislative history of the section.

Also, if there was no "use" actually being made of a lease or claim as of the date of enactment, there is simply no benchmark of comparison of the "manner and degree" of the post–FLPMA use with the use as of enactment. Expressed another way, the "manner and degree" of pre–FLPMA use, if there were none, means that *any* new use is not of the same "manner and degree" and must be regulated so as not to impair suitability for preservation as wilderness. In this sense, then, "existing use" and "manner and degree" dovetail and point toward actual use.

I conclude, then, that Congress' intent was to grandfather *actual uses* of a particular area as they existed on the date of passage of the Act, rather than to protect uses initiated or expanded after the Act passed without regard to their impact on wilderness. Expressed another way, its objective was to protect actual, ongoing activities from curtailment solely for wilderness protection purposes, rather than to grant a blanket exemption for particular kinds or categories of uses or legal entitlements.

This means specifically that if a mining claim was previously located in a wilderness study area, but was not being actively worked (except for annual assessment work), work cannot be initiated or resumed after passage of FLPMA without being subject to such regulations as the Secretary deems necessary to protect the area's wilderness characteristics from impairment. Similarly, a mineral lease on which there was no on–the–ground activity could not qualify for the "existing use" grandfather. It is, in other words, the actual use of the area, and not the existence of some presumed entitlement for use, which is controlling.

Following similar reasoning, I believe the existing mining use exception for mining and mineral leasing is limited geographically by the area of active development, and the logical adjacent continuation of the existing activity. This is not necessarily the boundary of the particular mining claim or mineral lease embracing an actual mining operation. More than one mining claim or mineral lease may be included under the umbrella of "existing use" if they are embraced in an actual operation as of the date of the passage of FLPMA. Nonadjacent activities on claims or leases would not qualify as part of the same "existing use."[56] Any claims or leases not actually being worked or not logically a continuation of an ongoing operation are subject to regulation in order to protect the area's wilderness characteristics.

[56] In determining what is adjacent activity, as in other determinations made in implementing § 603, a "rule of reason" must be followed. For example, an oil or gas well drilled a quarter–mile away from an area impacted by the existing development could be considered "adjacent," while a well drilled five miles from the area impacted by the existing well site would ordinarily not be. Of course, topography and other site–specific characteristics would ultimately control.

I note that this conclusion is somewhat different from the conclusion stated by the Deputy Solicitor in his Jan. 8, 1978 opinion, at p. 9, which stated that the existing use is limited geographically by the boundary of a particular mining claim embraced in an actual mining operation. Upon further reflection, I have determined that the legal boundary of a claim or lease should not control what Congress meant by an "existing use." Instead, I believe Congress intended to allow existing operations to continue across lease or claim boundary lines onto immediately adjacent claims or leases if (a) operations were actually being conducted when FLPMA became law, and (b) the operations continued in the same "manner and degree" as before.

(i) Mineral assessment work

The Mining Law of 1872 requires that a mining claimant perform annual assessment work on his unpatented mining claim.[57] Failure to perform assessment work causes the claim to be subject to relocation by another.[58] It also constitutes grounds for an action to cancel by the United States.[59]

It seems obvious that the necessary assessment work can and should be considered an "existing mining * * * use" entitled to continuation.[60] It is, of course, subject to regulation both to the extent it differs in "manner and degree" from how it was being conducted on the date of approval of the Act (discussed at pp. 114–115, below) and to the extent it unnecessarily or unduly degrades the lands or resources involved, or the environment (discussed at pp. 116–119, below). The extent of the Secretary's power to regulate in this context will be discussed in more detail below (pp. 118–122).

b. "*Mineral Leasing*". Congress' reference to "mineral leasing" in sec. 603(c) is ambiguous.

Viewed in one literal way, Congress has provided for the "continuation of * * * mineral leasing in the manner and degree in which [it] was being conducted" at enactment. Although this is a possible reading of the phrase, its effect would be to repeal the Secretary's traditional statutory discretion to lease minerals,[61] and instead man-

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[57] R.S. § 2324, 30 U.S.C. § 28 (1970).

[58] R.S. § 2324, 30 U.S.C. § 28 (1970).

[59] 43 CFR 3851.3(a). *See Hickel* v. *Oil Shale Corp.*, 400 U.S. 48 (1970).

[60] Of course, where no assessment work has been done in the past (which makes the claim voidable but not void), the "existing use" exception would not apply, since there was no existing use. When a claimant proposes to do assessment work when it had not been done when FLPMA became law, the assessment work itself is subject to regulation so as not to impair the suitability of the area for preservation as wilderness.

[61] Numerous cases have emphasized the plenary authority of the Secretary to refuse to issue leases when he considers such issuance contrary to the public interest. *See, e.g., Udall* v. *Tallman*, 380 U.S. 1, 4 (1965); *Duesing* v. *Udall*, 350 F. 2d 748 (D.C. Cir. 1965); *T. R. Young, Jr.*, 20 IBLA 333 (1975).

date mineral leasing in wilderness study areas presumably at the rate and on the same terms ("manner and degree") as had been done at enactment. The Secretary would have no authority to refuse to issue or renew such leases either to preserve an area's wilderness suitability or for any other reason—except where renewals or issuance of new leases differ in "manner and degree" from prior leasing.

There is no indication in the legislative history that this rather extraordinary result was intended.[62] Furthermore, Congress expressly provided that FLPMA works no "repeals by implication." [63] Therefore, I conclude that Congress did not intend to strip the Secretary of the discretion it has traditionally accorded him with respect to mineral leasing.

This conclusion does not solve all the ambiguity in the "mineral leasing" reference. Even assuming that Congress was referring to mineral leases rather than a continuing pattern of mineral leasing, the question then is whether Congress meant to grandfather the leases themselves, regardless of whether operations were being conducted on them on Oct. 21, 1976, or only to grandfather those operations actually being conducted on Oct. 21, 1976 on those leases.

On the one hand, the separate reference in sec. 603(c) to "mineral leasing" as well as to "mining uses" suggests that Congress intended to grandfather the leases themselves—rather than simply the operations on those leases.

On the other hand, the House Committee Report on the House version, which eventually became sec. 603(c) in the final bill, describes Congress' intent as to grandfather "existing * * * mineral uses" rather than all activities on existing mineral leases, regardless of whether they were underway by Oct. 21, 1976, when FLPMA became law.[64] Specifically, the Committee Report's reference to "existing mineral uses," as well as "appropriation under the mining laws," strongly suggests that the separate reference to "mineral leasing" was added to sec. 603(c) simply to clarify that "existing mining * * * uses" covered activities carried out under the mineral leasing laws as well as under the mining laws. The mere issuance of a mineral lease has no impact on an area's wilderness characteristics—it is operations conducted pursuant to a lease which can impair the suitability of an area for preservation as wilderness.

At bottom the question reduces itself to a determination whether Congress used the words "mineral leasing" as a use actually taking place on the public lands, or more broadly as a legal entitlement by which a lessee would be allowed to conduct mining operations on the land irrespective of whether or not the operations would impair the

[62] *See* p. 103–104, *supra*, esp. Note 33.

[63] *See* § 701(f), 43 U.S.C.A. § 1701 (West Supp 1978) note.

[64] *See* H. Rep. No. 94–1163, 94th Cong., 2d Sess., p. 17 (1976), discussed at p. 104, *supra*.

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suitability of the area for wilderness designation. I have already concluded that "mining * * * use" refers to actual operations rather than a legal entitlement. I conclude the Congress intended the same result for mineral leasing.

Limiting the grandfather clause's operation to drilling and other operations actually taking place on mineral leases on Oct. 21, 1976, does not mean that additional activity on existing mineral leases is prohibited. Rather, exploration and development operations can continue in the manner and degree that such activity was being conducted on Oct. 21, 1976, including the drilling of new wells within the guidelines discussed above at pp. 109–113, and, of course, increased activity can occur subject to regulation by the Secretary to the extent necessary to preserve the area's suitability for preservation as wilderness.

Similarly, existing leases may be renewed or new ones issued so long as they are made subject to appropriate regulations, lease stipulations and other safeguards designed to prevent operations under the lease from impairing the area's suitability for preservation as wilderness.[65]

[65] For the Department's view on an analogous issue involving wilderness study areas in National Forests, *see Esdras K. Hartley*, 23 IBLA 102 (1975) where the Board of Land Appeals held that the BLM must make a case-by-case review of whether and under what conditions mineral leasing is appropriate in such a wilderness study area.

(i) Preference right leases

Preference right leases pose no special problem. A preference right lease applicant who makes the necessary statutory showing[66] and otherwise complies with statutory requirements[67] is entitled to a preference right lease.[68] Yet the Secretary concededly has wide discretion, and a duty, to include lease terms adequate to protect the environment.[69] The lease terms must include appropriate measures to prevent impairment of the area's suitability for preservation as wilderness. See also Part III(B)(6) at pp. 118–119, below.

4. "*Manner and Degree*". The next question is how to interpret the phrase "manner and degree." I believe this is properly read in tandem with the word "existing," to qualify the Secretary's authority to manage the public lands under review in order to preserve their wilderness characteristics. That is, "existing" and "manner and degree" establish as a benchmark the physical (including aesthetic[70]) impact a min-

[66] "Commercial quantities" of coal, or a "valuable deposit" of phosphate and other leasable minerals. *See* 43 CFR 3520.1–1 (1977).

[67] *See* 84 I.D. 442 (1977) ("unclaimed/undeveloped" opinion).

[68] *See NRDC v. Berklund*, —— F. Supp. —— (D.D.C. 1978); *appeal pending*, No. 78–1757 (D.C. Cir.).

[69] *Ibid.*

[70] The "manner and degree" language must be read against the backdrop of the definition of wilderness in the Wilderness Act, which Congress specifically incorporated into § 603 (a). *See* pp. 94–96, *supra*. That definition

(Continued)

ing or grazing activity existing on Oct. 21, 1976 was having on the area in question on that date. Any change in use or uses, or any change in the rate of use, which would alter the physical impact on the area is subject to regulation in order to preserve wilderness characteristics. Of course, it is only the *physical* and *aesthetic* impact caused by the use and not the use itself which need be measured, for it is the use's impact on the land which could impair the suitability of an area for wilderness.[71] In assessing the physical impact of existing uses, a rule of reason must be followed.[72] It bears reiteration that it is the physical impact on a study area by all uses, including mining or grazing, which sec. 603 directs the Secretary to regulate.

Except for the *proviso* regarding "unnecessary or undue degradation" and "environmental protection," the Secretary is directed under sec. 603 to regulate only those uses that may impair wilderness characteristics of lands under review. In this regard, the "manner and degree" qualification on the Secretary's authority does not, for example, necessarily fix as an upper limit the exact number of cattle currently grazing in an area. If more cattle could graze there without having any more impact on an area's wilderness suitability, or without unduly or unnecessarily degrading the land or resources, or harming the environment, then sec. 603 would permit the Secretary to allow the additional cattle to graze. If the physical impact is increased, however, the activity must be regulated to the extent necessary to prevent impairment of the area's wilderness suitability.

5. "*Valid Existing Rights.*" Sec. 701(h) of FLPMA, 43 U.S.C.A. § 1701(h) (West Supp. 1978), states that, "All actions by the Secretary concerned under this Act shall be subject to valid existing rights." Mineral leases, mining claims and grazing permits all grant varying rights and privileges and these rights and privileges cannot be taken pursuant to sec. 603 or any other section of FLPMA. The degree to which sec. 603 authorizes regulation of valid existing rights to protect wilderness suitability is thus bounded by the fact that these rights must not be condemned or taken.

The degree to which FLPMA allows regulation of the exercise of these rights and privileges without "taking" them in the constitutional sense is a complex one which can be addressed only in concrete cases. We can, however, discuss the pertinent line of inquiry. The first question is

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speaks of the aesthetic of wilderness; *e.g.*, "untrammeled by man," "primeval character or influence," "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable."

[71] Thus extracting 5 tons of ore by pick, shovel and mule should have far less impact than extracting the same amount by bulldozing, blasting and trucking. Similarly, extracting 5 tons of ore per year has far less impact than extracting 500 tons per year.

[72] Thus the difference between 35 and 40 cows grazing, or between 190 and 200 tons of ore being extracted, would ordinarily be insignificant.

the nature of the "right" held by the lessee, permittee, or mining claimant. A lease may contain an absolute right to develop or a qualified right.

An absolute right to develop is not subject to defeasance by sec. 603(c), or anything else. Yet such absolute rights are rare, if they exist at all. Most permits and mineral leases, especially those issued in recent years, qualify the holder's right to develop in various ways.

Mineral leases typically issued by the Department in modern times, for example, require the lessee to comply with the Department's rules and regulations in effect on the date of the lease, *and* those which are duly adopted thereafter. This is a major limitation on the right of the lessee, and accordingly, limits the protection provided by sec. 701(h).

As noted earlier, holders of prospecting permits under the Mineral Leasing Act also have a right to a lease under certain circumstances.[73] Yet that right is subject to compliance with applicable regulations and the Secretary may make the lease itself subject to appropriate terms and conditions to carry out his overall duty to manage public resources in the public interest, as well as his specific duties under such statutes as FLPMA, and particularly sec. 603.

Similarly, the right of the holder of a mining claim is subject to the Secretary's power to issue regulations to govern operations on these claims,[74] and the Secretary's authority pursuant to sec. 302(b) of FLPMA to regulate operations on, and access to, mining claims, and to "prevent unnecessary or undue degradation" of the public lands.[75] And finally, a mining claim is obviously a valid "right" only if it is a valid, properly maintained mining claim.

The rights of grazing permittees are also qualified by the terms of the permit and the Secretary's regulations on the subject.[76]

It is, then, impossible to generalize about the effect of sec. 701(h) on regulation to protect wilderness suitability under sec. 603(c). Each claim, permit or lease must be examined to determine the nature of the rights conveyed by the United States, and the nature of the impairment of that right proposed to protect an area's wilderness suitability.

Finally, it deserves emphasis that the exercise of a right may be regulated without the right being "taken" in a constitutional sense. That is, although property rights may not be taken under the Fifth Amendment to the United States Constitution without compensation, the United States Supreme

[73] *See* p. 114–115, *supra*.

[74] *See* 30 U.S.C. § 22 (1970).

[75] *See* pp. 118–119, *infra*.

[76] *See* 43 CFR Part 4100.

Court has made clear on many occasions that the exercise of such rights may be regulated and to some extent impaired in furtherance of a proper governmental purpose without effecting a constitutional "taking," requiring compensation.[77] Sec. 701 (g), then, must be read as prohibiting the Secretary from taking "valid existing rights," but not from regulating the exercise of that right in order to carry out sec. 603's purposes.

6. *Preventing "Unnecessary or Undue Degradation" and "Afford-[ing] Environmental Protection".* The grandfather clause relating to existing mining and grazing uses and mineral leasing is an exception from the general direction in section 603 to manage wilderness candidate lands "so as not to impair the suitability of such areas for preservation as wilderness."

It is clear, then, that if the level of physical impairment caused to an area by mining and grazing differs in "manner and degree" from the existing level of physical impact, it must be regulated to the extent necessary to prevent impairment of the area's wilderness suitability. Except for that specific qualification imposed on the Secretary's authority by the words "existing" and "manner and degree," sec. 603 directs the Secretary to regulate existing uses of BLM-administered lands under review in order to preserve their wilderness characteristics. To take a simple example, a miner who was using a pickax and burro on Oct. 21, 1976, to extract one ton of ore a year may not begin using a bulldozer and explosives thereafter to extract 100 tons a year in a wilderness study area unless these activities are subject to appropriate regulation, assuming that the greater activity might impair the suitability of the area for wilderness.

Sec. 603(c) contains a *proviso* stating:

> That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

This *proviso* modifies both preceding clauses of the sentence: the new use nonimpairment clause, and the existing listed use exemption from nonimpairment.[78]

It should be noted that the *proviso* does not refer to protection of wilderness characteristics. Rather, it refers to degradation of the lands, resources, and "environmental protection." The *proviso* is, however, part of the same sentence as, and therefore qualifies, the grandfather

[77] *See, e.g., Penn Central Transp. Co. v. City of New York*, —— U.S. ——, 98 S. Ct. 2646 (1978); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); Sax, "Takings and the Police Power," 74 Yale L.J. 36 (1963); Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundation of 'Just Compensation' Law," 80 Harv. L. Rev. 1165 (1967).

[78] A nearly identical sentence appears earlier in FLPMA, in § 302(b), *see* 43 U.S.C.A. § 1732(b) (West Supp. 1978): "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." The sentence in 603(c) adds to this the words "or their resources or to afford environmental protection."

clause for existing mining and grazing uses and mineral leasing.

The effect of the *proviso* on the grandfather clause is therefore unclear; *i.e.*, how should the Secretary carry out his mandates of protecting the lands and resources from unnecessary and undue degradation; and protecting the environment, consistent with the grandfather clause?

I believe that the *proviso* authorizes regulation of activities for reasons other than their impact on wilderness suitability. That is, I conclude that if an existing mining or grazing use is already impairing an area's wilderness qualities, this *proviso* does not supply the Secretary with authority to regulate it solely to preserve wilderness suitability. It does, however, vest the Secretary with authority to regulate these activities to prevent unnecessary and undue degradation and to protect the environment.

To take a specific example, if on Oct. 21, 1976, a miner was using motorized vehicles, explosives, and drilling equipment to explore for hardrock minerals on a particular mining claim, the Secretary may not now restrict the manner and degree of the miner's activities solely in order to preserve wilderness characteristics. But if the blasing or other activities being conducted are causing undue or unnecessary degradation to the lands, they can be regulated to prevent that kind of degradation. That kind of regulation cannot be undertaken to protect an area's suitability for wilderness preservation, although the effect of the regulation may incidentally help preserve that suitability.

It may be a fine and perhaps impossible line to draw between preventing environmental damage or undue or unnecessary degradation of the public lands and resources on the one hand, and allowing ongoing activities to continue despite wilderness impairment on the other. In some cases, in fact, the purposes may overlap. In such cases, FLPMA as a whole stands foursquare for the notion that uses of the public lands and resorces should be regulated to protect the environment and prevent undue or unnecessary damage. A miner, for example, does not have the right to continue to engage in poor mining or reclamation practices which cause, for example, unnecessary degradation or pollution if that's what he was doing on Oct. 21, 1976. The grandfather clause cannot be construed to extend that far.

7. *Appropriation of Lands Under the Mining Laws.* As I pointed out earlier, elsewhere in FLPMA Congress in effect amended the Mining Law so that the Secretary could discharge his obligations under sec. 603. That section states, in appropriate part:

*Except as provided in * * * section 603 * * * no * * * section of this Act shall*

in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under the Act, including, but not limited to, rights of ingress and egress.[79]

Under the Mining Law, the Secretary has the authority to regulate the conduct of operations on mining claims, but the specific authorization in the portions of 302(b) quoted above and 603(c) of FLPMA makes it clear that he can regulate activities carried out pursuant to those claims for the sole purpose of protecting wilderness characteristics (except for existing uses).

But, while directing the Secretary to regulate mining uses, Congress at the same time prohibited the Secretary from withdrawing any of the wilderness study lands from appropriation under the Mining Law of 1872, solely to preserve wilderness characteristics. Sec. 603 (c) states:

Unless previously withdrawn from appropriation under the mining laws, such lands shall continue to be subject to such appropriation during the period of review unless withdrawn by the Secretary under the procedures of section 204 of this Act for reasons other than preservation of their wilderness character.

Although this sentence deprives the Secretary of authority to withdraw wilderness review lands from appropriation under the mining laws in order to protect their wilderness characteristics, sec. 603(c) clearly directs the Secretary to regulate *how* activities undertaken pursuant to the mining laws are carried out.[80]

In order to consider in more detail the impact of sec. 603 on mineral assessment work, we must examine more closely the phrase "appropriation under the mining laws" as it is used in sec 603 (c). Prior administrative decisions of this Department suggest that appropriation includes more than location of a mining claim by staking and monumenting. The filing of a location notice under other public land law statutes without actual settlement or occupancy initiates no rights in the location, *Donald R. Glittenberg*, 15 IBLA 165 (1974), *Peter Pan Seafoods, Inc.* v. *Shimmel*, 72 I.D. 242 (1965). Conversely, use and occupancy without a filing of a notice of location gives the locator no right to purchase. *Kennecott Copper Corp.*, 8 IBLA 21 (1972). If land is open, settlement and improvement establish rights which the Department will recognize if proper notice is timely filed. *Vernard E. Jones*, 76 I.D. 133 (1969).

The term "appropriation" as it has been used under these other public land law statutes envisions not only the *creation* of a right but the *maintenance* of the right as well.

[79] 43 U.S.C.A. § 1732(b) (West Supp. 1970). (Italics added.)

[80] Unlike the specific prohibition in sec. 603 precluding the Secretary from withdrawing wilderness review lands from appropriation under the mining laws, no provision in sec. 603 prevents the Secretary from prohibiting new grazing uses if such a use would impair an area's wilderness characteristics. Sec. 603 therefore directs the Secretary to regulate and, if necessary, prohibit new grazing uses if required in order to preserve the wilderness characteristics of the land. Issuing grazing permits and mineral leases is discretionary with the Secretary; thus, they are easier to regulate under 603(c) than mining claims.

See, generally, *Margaret Klatt*, 23 IBLA 59 at 70–76 (dissent) (1975). To create a right to a mining claim, the claimant must comply with Rev. Stat. sec. 2324, 30 U.S.C. § 28 (1970), with regard to location. To maintain that right, the claimant must also, among other things, perform annual assessment work.[81] Failure to perform such work causes the ground to be in effect, "unappropriated" public domain and subject to relocation by another, Rev. Stat. sec. 2324, 30 U.S.C. § 28 (1970), as well as subject to an action to cancel by the United States, 43 CFR § 3851.3 (a).

As we have seen above (p. 113), the Secretary's wilderness protection responsibilities extend to the regulation of assessment work. Where assessment work on mining claims located in wilderness study areas is causing impacts which do not exceed the manner and degree in which those impacts were occurring on Oct. 21, 1976, then the Secretary may regulate under sec. 603 (c) only to insure that assessment work will not cause unnecessary and undue degradation of the involved lands and their resources or to protect the environment. Impacts exceeding the manner and degree of impacts on Oct. 21, 1976, will be regulated in accord with a stricter standard, *i.e.*, to guarantee that the area's suitability for inclusion within the wilderness system will not be impaired.[82]

Interim wilderness study area regulations are currently in preparation in the Department. They probably will require that a mining claimant submit a plan of operations to BLM in advance of engaging in new work. The authorized officer will scrutinize the claimant's proposed activities on the mining claim (including assessment work) to determine their compatibility with the Secretary's duty to protect the area from impairment of its wilderness suitability, from unnecessary and undue degradation. If the proposed activities are incompatible, the authorized BLM officer will disapprove the plan of operations and require the claimant to provide a plan outlining alternative methods to conduct operations. I expect that most, if not all, of the conflicts between the need to perform assessment work and management under FLPMA sec. 603 can be resolved at this stage. For example, the authorized officer could require use of existing roads or ways or other forms of access, and could re-

[81] Rev. Stat. § 2324, 30 U.S.C. § 28 (1970). A mining claimant must also record a notice of location and file an affidavit of assessment work or notice of intent to hold under § 314 of FLPMA; otherwise the claim is deemed abandoned. *See* 43 U.S.C.A. § 1744(a)(1) (West Supp. 1978).

[82] I believe this standard is at least theoretically more strict because it is possible to conceive of a situation where, in order to perform assessment work and maintain his or her claim, a mining claimant could cause "necessary and due" degradation which would constitute an impairment of wilderness characteristics.

quire mitigating measures along with revegetation and other restoration requirements.

8. *Assignment.* The identity of the person carrying out the use is not important. Congress focused on the impact rather than the use. An individual, therefore, who was mining a claim on Oct. 21, 1976 can, assuming the assignment is otherwise valid, assign his claim to another person and the assignee may continue to mine under sec. 603, if his operations are conducted in the same "manner and degree" as those of the assignor on Oct. 21, 1976. The same result would obtain with a mineral lease or grazing permit assignment.

9. *Other Authority.* The Secretary under sec. 603 is not prevented from acting pursuant to other parts of FLPMA and other statutory authority in order to regulate existing mining and grazing activities so that a land use management objective other than the preservation of an area's wilderness characteristics can be met. For example, under the Taylor Grazing Act, 43 U.S.C. § 315 (b) (1970), the Secretary may revoke a grazing permit if he determines that a particular range can no longer support a certain number of animals due to drought. Sec. 603 should not be read to prohibit such a revocation in a wilderness study area if justified for reasons other than wilderness protection. Sec. 603 does not, in other words, freeze uses at their existing levels if, for reasons unrelated to wilderness protection, the Secretary determines they must be curtailed in order to carry out his other statutory responsibilities. And one of these statutory responsibilities is, as noted above, the direction in sec. 603(c) (which is also repeated in sec. 302(b)) to "prevent unnecessary or undue degradation of the lands." [83]

C. *Section 603(c)'s Effect on Access to Private Lands*

In general, access across public lands can only be granted under Title V of FLPMA, and the granting of any right-of-way is discretionary with the Secretary. Sec. 603 limits the discretionary authority of the Secretary by allowing him to grant access only if it will not impair the suitability of the area under review for wilderness designation.[84]

Currently, the Solicitor's Office is preparing a memorandum involving the Secretary's authority to regulate access to and from mining claims. Regarding existing access across wilderness study lands to private property, any legal opinion is best given after reviewing each separate factual situation in light of the criteria in sec. 603.

D. *General Effect of Section 603(c)*

It should be emphasized that sec. 603(c) does not limit mining and grazing activities to the precise level at which they were occurring on Oct. 21, 1976. It allows for expansion or curtailment of these activities so long as the wilderness characteristics of the land under review are not impaired.

[83] As noted above, § 603(c) goes on to refer to "resources" as well as lands, and expands the Secretary's authority to "afford environmental protection."

[84] *See also* § 302(b), 43 U.S.C.A. § 1732(b) (West Supp. 1978), discussed at pp. 117 *supra*.

February 13, 1979

It should also be reemphasized that sec. 603's restrictions are interim only, until a roadless area has been determined not to have wilderness characteristics, or until Congress has provided otherwise.

In summary, Congress intended mining and grazing activities to continue on BLM-administered lands under review for wilderness suitability, but subject (except for existing mining and grazing activities conducted in the same manner and degree as were occurring on the date of passage of FLPMA) to regulation so that they would not impair an area's wilderness characteristics.

This opinion was prepared with the assistance of Frederick N. Ferguson, Deputy Solicitor, John D. Leshy, Associate Solicitor for Energy and Resources, David Grayson, Assistant Solicitor for Land Use, Larry McBride, and Carolyn Osolinik of the Division of Energy and Resources. Gail Achterman and Robert Crotty, formerly attorneys in the Division of Energy and Resources, also worked on this opinion during their period of employment with the Department.

LEO KRULITZ,
Solicitor.

APPENDIX A

INITIAL WILDERNESS STUDY AREAS BUREAU OF LAND MANAGEMENT

Group No. A: Established Primitive Areas

Area/State:	*Federal Register Citation*
Aravaipa Canyon, Arizona	(36 FR 643; 8461)
Paria Canyon, Arizona	(34 FR 642)
Paiute, Arizona	(40 FR 44168)
Chemise Mountain, California	(40 FR 44341)
Powderhorn, Colorado	(38 FR 23427)
Centennial, Montana	(40 FR 32848)
Humbug Spires, Montana	(37 FR 18573)
Beartrap Canyon, Montana	(37 FR 18573)
Dark Canyon, Utah	(35 FR 18337)
Grand Gulch, Utah	(35 FR 14859)
Scab Creek, Wyoming	(40 FR 26721)

Group No. B: Established Natural Areas

Devil's Garden, Utah	(35 FR 19530)
Escalante Canyon, Utah	(35 FR 19529)
North Escalante Canyon, Utah	(35 FR 19529)
Phipps-Death Hollow, Utah	(35 FR 19530)

APPENDIX A—Continued

Group No. B: Established Natural Areas—Continued

Area/State—Continued	*Federal Register Citation*
The Gulch, Utah	(35 FR 19529)
Vermillion Cliffs, Arizona	(34 FR 642)
Big Sage, Arizona	(37 FR 20731)
Birds of Prey, Idaho	(36 FR 20228)
El Malpais, New Mexico	(39 FR 17451)
Rare Lizard and Snake, Colorado	(30 FR 1194)
High Mesa Grassland, Colorado	(30 FR 1194)
Sand Dune, Colorado	(30 FR 1194)
Book Cliffs, Utah	(33 FR 15914)
Mountain Meadow, Nevada	(30 FR 1194)
Bristlecone, Nevada	(30 FR 1194)
Pygmy Sage, Nevada	(30 FR 1194)
Pinyon-Joshua Pine, Nevada	(30 FR 1194)
Goshute Canyon, Nevada	(35 FR 19367)
Swamp Cedar, Nevada	(35 FR 19367)
Shoshone Ponds, Nevada	(35 FR 19367)
Turbinella and Gambel, Arizona	(30 FR 7899)
Pine Creek Canyon, Nevada	(30 FR 1194)
Sunrise Mountain, Nevada	(35 FR 14850)
Virgin Mountain, Nevada	(35 FR 9864)
Joshua Tree, Utah	(35 FR 9864)
Baker Cypress & Lava Rock, California	(30 FR 1194)
Bitterbrush, California	(30 FR 18224)
Lahontan-Cuthroat Trout, Nevada	(39 FR 6747)
Negit Island, California	(37 FR 18224)
Piute Cypress, California	(30 FR 1194; 7900)
San Benito, California	(36 FR 16122)
China Cup Butte, Idaho	(30 FR 1194)
Grassland Kipuka, Idaho	(30 FR 1194)
Halibut Cove Natural	(28 FR 1048)
Forest Study Area, Alaska	
Square Butte, Montana	(37 FR 18573)
Mathers, New Mexico	(35 FR 13670)
Guadalupe Canyon, New Mexico	(36 FR 17451)
Link Flats, Utah	(33 FR 15915)
Brewer Spruce, Oregon	(30 FR 1194)
Douglas Fir, Oregon	(30 FR 1194)
Little Sink, Oregon	(38 FR 21167)
Western Juniper, Oregon	(28 FR 2279)
Lost Forest, Oregon	(38 FR 10825)
Needle Rock, Colorado	(37 FR 17499)

APPEAL OF J. A. LAPORTE, INC.

IBCA-1146-3-77

Decided *February 14, 1979*

Contract No. CX 500031057, National Park Service

On Reconsideration, the equitable adjustment is recomputed.

1. Rules of Practice: Appeals: Reconsideration—Rules of Practice: Appeals: Timely Filing

When an appellant files a timely motion for reconsideration asking that an an equitable adjustment be increased, the effect is to prevent finality from attaching to the original decision and the Board has jurisdiction to consider a Government response asking that the equitable allowance be reduced, even though the response was not filed within the 30-day period allowed for initial filing of a motion for reconsideration.

2. Contracts: Disputes and Remedies: Equitable Adjustments—Rules of Practice: Appeals: Reconsideration

When arguments advanced in a motion for reconsideration convince the Board that the formula used in determining an equitable adjustment was not the most accurate method but where neither party submits a better method, the Board will vacate its original finding regarding the equitable adjustment and make a recomputation based on the evidence of record.

APPEARANCES: Mr. Dillard C. Laughlin, Attorney at Law, Phillips, Kendrick, Gearhart & Aylor, Arlington, Va., for the appellant; Mr. Donald M. Spillman, Department Counsel, Atlanta, Ga., for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

Appellant's timely motion asked the Board to reconsider its decision of July 6, 1978 (78-2 BCA par. 13,306). That decision allowed an equitable adjustment of $230,000 for a change in the captioned contract and appellant alleges that the amount of the equitable adjustment should be increased to $496,080.

[1] The Government responded to the merits of appellant's motion and then, in the nature of a cross-motion, alleged that the equitable adjustment should be reduced. The Government's response was not filed within the 30-day period allowed by the Board's rules for the filing of a motion for reconsideration. Since the effect of the filing of appellant's timely motion was to prevent finality from attaching to the Board's original decision, the Board has jurisdiction to reconsider all matters in the original decision, including the portion of the decision that was favorable to the party who filed the timely motion for reconsideration. *Walsky Construction Co.* ASBCA Nos. 19875, 20501 (June 17, 1977), 77-2 BCA par. 12,632; *E. W. Bliss Co.*, ASBCA Nos. 9489 *et al.* (June 28, 1968), 68-2 BCA par. 7119.

The Board has given careful consideration to the arguments advanced by each party and to the evidence on which the parties rely. For reasons which will be discussed

in detail later in this decision, the Board now concludes that a better method of computing the equitable adjustment can be derived from the evidence of record. Accordingly, the Board's original decision that appellant is entitled to an equitable adjustment of $230,000 is hereby vacated.

Appellant's Arguments

In moving for reconsideration, appellant advances a number of arguments under five general headings. Under the first heading, appellant argues that the equitable adjustment allowed by the Board is inadequate because the as-done pumping costs exceeded the bid estimate by $786,665.42.[1] However, the mere fact that appellant's costs increased by a substantial amount is not proof that the Government was responsible for the increase. Absent a showing that the Government caused the increase, or some portion of it, the increase in costs may have indicated only that the bid estimate was too low. Appellant's argument does emphasize the desirability of finding a method of computing the equitable adjustment which does not use the bid estimate as a starting point.

Appellant's arguments under headings two, three, and four attempt to establish the extent of the Government's responsibility for the increased costs. An examination of the evidence on which appellant bases the arguments discloses that all three arguments are flawed by a fundamental misinterpretation of the evidence and by certain assumptions which have no basis in the record.

Appellant assumes that the testimony of its consulting engineer establishes that its total pumping costs were increased first by 13.3 percent for increased pumping time and then by an additional 15 percent for increased maintenance or down time, all because of the change by the Government. The evidence does not support such assumptions.

With respect to the increase in pumping time, appellant's consulting engineer introduced exhibit A-4 on which he plotted the theoretical amount of time that would have been spent pumping, at each 100-foot location along the 10,200-foot length of the beach, to achieve an even distribution of the contract quantity of 1,250,000 cubic yards of sand. This theoretical computation resulted in an estimate that even distribution could have been achieved in 2424.64 hours of pumping time. Appellant's consulting engineer then plotted a curve based on appellant's actual pumping records which indicated that a total of 2748.40 hours of pumping time were required to complete the contract. This second curve showed where the Government's directions led to deviations from the even distribution contemplated by the contract. No sand was pumped on the beach south of location 223400 in

[1] The figure used by appellant for the increase in pumping costs is derived by reducing the total contract costs by the amount of the bid estimate for mobilization costs. As discussed later, the bid estimate for mobilization does not represent an accurate estimate of actual costs. See footnote 8.

the area nearest to the borrow pit. This deficiency was made up by pumping additional quantities to various locations farther north on the beach and farther from the borrow pit. According to appellant's exhibit A–4, the only measurable effect of the change on appellant's operations was that the actual pumping time of 2748.40 hours was 323.76 hours more than the estimate of 2424.64 hours for even distribution.

Using the estimate of increased pumping time as a starting point, appellant's consulting engineer converted it to a percentage increase of 13.3. The calculation is mathematically correct but irrelevant to the process of determining an equitable adjustment for the change. Appellant's engineer testified that roughly 500,000 cubic yards of sand were involved in the change, leaving the remainder of 750,000 cubic yards placed as required by the contract. Since an equitable adjustment for a change can take into consideration only the costs of the changed portion of the contract,[3] the Board specifically rejected appellant's attempt to relate the change to the total pumping time which included both changed and unchanged work.

After discussing the basis for the computation of the increased pumping time, appellant's engineer was asked (II Tr. 136): "Q. Now, in addition to that 13.3 percent increase, would you project any additional increase and, if so, what was the basis for that?" Appellant's engineer gave an extended answer (II Tr. 136, line 24, to p. 140, line 24) in which he stated that the additional pumping time made it necessary to add time for repairs and additional greasing. He did not quantify his estimate of the additional time for these two operations. Instead, he discussed at length the problem appellant had with critical velocity in the 24–inch pipeline which made it necessary to open up the fuel racks to inject more fuel into the cylinders so the engines would develop more horsepower for the pumps. The engineer stated that appellant had anticipated a problem with critical velocity only on the maximum line and had expected that the operation would improve when pumping over shorter lines, but the problem remained for the entire job.

Apparently recognizing that most of this answer related to job problems that could not be attributed to the Government, appellant's counsel interrupted the answer to ask if the engineer had an opinion as to the additional increase in time required because of the change by the Governmnet. The witness did not respond directly to the question but answered as follows (II Tr. 141): "A. I realize it is very difficult to assign a value on this, but I estimate he spent 15 percent longer on the job because he was pushing all of this machinery as hard as he was pushing it."

[3] *Dale Ingram, Inc. v. United States*, 201 Ct. Cl. 56, 71 (1973).

It is significant that the engineer attributed the additional time to pushing the machinery hard and that he did not attribute the necessity for pushing the machinery to the Government. It must be remembered that, as a result of the change, appellant pumped sand only to those locations where he was required to pump sand by the original terms of the contract. If appellant had a problem with the critical velocity of the sand in the 24-inch line for the entire northern two-thirds of the designated beach area, as his engineer testified, then the problem was inherent in the pumping machinery and would have existed even without the change.

A reexamination of the evidence on which appellant relies discloses that the only factors relevant to a determination of an equitable adjustment which may be gleaned from the testimony of appellant's engineer are that the actual pumping time was 323.76 hours more than his original estimate and that those additional hours of pumping time were performed at a higher cost than originally estimated.

At p. 7 of the motion for reconsideration, appellant suggests that the computation of his increased costs should be as follows:

Total actual as-done costs	$1,874,165.42
Less: Mobilization	150,000.00
As-done pumping costs	1,724,165.42
Divided by 1.15 for increased down time	
Actual as-done costs increased for additional pumping	1,499,274.20
Divided by 1.133 for increased as-bid pumping	
Actual as-bid costs	1,323,278.20
Adjustment for increased pumping	175,996.00
Adjustment for increased down time	224,891.22
Total increased costs	400,887.22
Rounded by using 30% to $397,884.33	(.30295)

The computation is erroneous in each of its steps, beginning with the cost of mobilization. Appellant's president testified that his bookkeeping yielded only total job costs and did not separate mobilization costs and pumping costs.[3]

Since mobilization costs were involved along with the total cost, it cannot be assumed that the bid estimate of $150,000 for mobilization was the actual cost. The two cost items for pumping and mobilization are indistinguishable due to appellant's recordkeeping and in these circumstances we can only assume that both costs rose proportionally.

[3] "Q. There was a separate item in the bid for mobilization, was there not.

"A. Yes, there was.

"Q. What was the amount of that?

"A. My bid was $150,000.00 for mobilization and demobilization.

"Q. Is there any way that you could break out of those costs you have tendered to the Court here the mobilization and demobilization costs?

"A. It would be quite difficult. It was * * * a lot of it was involved along with the total cost. We did not, what I mean is that we did not make a separte [*sic*] item in our normal bookkeeping of mobilization costs and pumping costs. We just had total job cost.

"Q. Do you expect some profit in your mobilization bid?

"A. Normally, not very much." (II Tr. 47).

An estimate of the actual mobilization costs may be deduced from the evidence of record. Appellant's bid estimate of pumping costs for 1,250,000 cubic yards, based on testimony of appellant's president (II Tr. 26) was $937,500. Adding the bid estimate of $150,000 for mobilization, the total estimated costs were $1,087,500. The total as-done cost for the contract of $1,874,165.42 represents a 72-percent increase over the bid estimate. Seventy-two percent of $150,000 is $108,000, bringing the total estimate of mobilization costs to $258,000.

The estimated as-done pumping costs then becomes $1,616,165.42 ($1,874,165.42 minus $258,000.00) instead of $1,724,165.42 as computed by appellant.

The next step in appellant's computation, dividing the as-done pumping costs by 1.15 for increased down time, is erroneous for two reasons. As discussed above, the testimony of appellant's engineer was that it took 15 percent longer to perform the job because the machinery was being pushed so hard. Pushing the machinery was required to overcome a critical velocity problem in the line and was not caused by the Government. Secondly, even if the increase in time could be attributed to the Government, the evidence of record does not support a conclusion that a 15-percent increase in total performance time translates directly into a 15-percent increase in costs.

It is apparent that fuel costs declined or ceased during periods when the pumping operation was shut down so it cannot be assumed that an increase in total time spent on the contract because of shutdown resulted in a commensurate increase in costs. Further, the correct correlation between increased performance time because of shutdowns and increased costs cannot be determined in view of the testimony of appellant's president that his bookkeeping yielded only total costs.

The final step in appellant's computation uses the percentage relationship between the estimated increase in pumping time and the total actual pumping time despite the testimony of appellant's engineer that only about 40 percent of the work was changed.

The entire calculation suggested by appellant is so filled with erroneous interpretations of the evidence and unwarranted assumptions that it offers no reasonable basis for computation of the equitable adjustment to which appellant is entitled as a result of the Government's change.

In the original decision on the amount of the equitable adjustment, the Board used the estimates of appellant's engineer that roughly 40 percent of the work was changed and that the contract could have been performed in 2424.64 hours of pumping time to compute that the changed work could have been pumped in 969.86 hours (40 percent of 2424.64). In argument number four, appellant alleges that the work which was changed could have

been performed in 743.73 hours of pumping time without the change, citing the pumping calculations which were used in plotting the even distribution curve in exhibit A–4. While these figures show that 500,000 cubic yards at the south end of the beach could have been pumped in an estimated 743.73 hours, not all of those 500,000 cubic yards were displaced as a result of the change. Appellant's exhibit A–4 shows that more than 100,000 cubic yards from locations 223400 to 222500 were placed where the contract required. The exhibit also shows that additional displacements further north amount to less than 50,000 cubic yards.[4]

This examination of exhibit A–4 in conjunction with the pumping calculations cited in appellant's motion leads inescapably to the conclusion that the estimate by appellant's engineer that roughly 40 percent of the work was involved in the change was a very rough estimate indeed. His own chart shows that less than 450,000 cubic yards were changed rather than 500,000 (40 percent of 1,250,000).

[2] Accordingly, the Board is now of the opinion that its reliance on the estimate of appellant's engineer, regarding the number of cubic yards involved in the change, was unwarranted.

[4] The scale used in appellant's exhibit A–4 and the nature of the curves do not permit a precise determination of the cubic yardage pumped at each location. An estimate can be made from the fact that 13,586.97 cubic yards would have been pumped at each location except for transition areas in order to achieve even distribution as called for in the contract.

The Board also followed appellant's method of calculating that the percentage of increase in performance time due to increased maintenance and down time resulted in the same percentage of increase in costs. As indicated above in the discussion of appellant's calculation of its estimated increase in costs, this approach failed to take into account the absence of any fixed relationship between additional time required for performance and additional costs attributable to the changes.

Finally, the Board applied the percentages of increased pumping time and increased maintenance to appellant's bid estimate of pumping costs for the changed work as a starting point for the calculation of the equitable adjustment. We are now persuaded by appellant's argument No. 1 that the bid estimate was unreasonably low and should not be used in such calculation.

It is upon the basis of the foregoing analysis that the Board has vacated its finding with respect to the amount of the equitable adjustment.

The Government's cross-motion for reconsideration to reduce the amount of the equitable adjustment submits a calculation (in item 10 of the motion) based on the contract price. This calculation does not take into consideration the increased costs resulting from the change and cannot constitute a proper basis for determination of the equitable adjustment. On oral argument, the Government further suggested that only 303,612 cubic yards of sand

were displaced in the change and that use of that figure in the Board's formula would reduce the amount of the equitable adjustment. Government Exhibit GX-2, from which the figure was derived, is based on the measurement of sand removed from the borrow pit and is not sufficiently correlated with the discharge points on the beach to enable a determination of the amount of sand involved in the change.

For the reasons stated above, the Board has determined that the formula it used in the original computation of the equitable adjustment was not as accurate a measure as is available for determining the amount of excess costs properly attributable to the change. Neither appellant nor the Government has offered an acceptable method of determining such costs. The evidence of record provides a basis for such determination, however.

As discussed above, a reasonable estimate of appellant's total pumping costs is $1,616,165.42. It follows that the total pumping time required for completion of the contract, 2748.40 hours, was performed at a cost of $588.04 per hour. This computation includes all of the additional costs of maintenance necessary to perform the hours of pumping, without resorting to the use of percentage estimates.

In our eariler decision, we found that the estimate of 323.76 increased pumping hours as a result of the change was accurate since it was based on appellant's experience with the same equipment in performing a prior contract utilizing the same borrow pit. Our reconsideration discloses no reasons for overturning that finding. We therefore find that the increase in pumping hours caused by the change was performed at a cost of $190,383.83 ($588.04 x 323.76).

On the basis of the testimony of appellant's counsulting engineer, the increased costs involved in performing the original estimate of 2424.64 pumping hours cannot be attributed to the Government since they were the result of pushing the machinery hard to overcome a critical velocity problem in the 24-inch line which persisted throughout the performance of the contract. Such increase would have occurred whether or not the contract was changed. When the Government-directed change caused additional hours of pumping in a high cost area, the Government is obliged to pay for those costs at the rate actually being experienced by appellant at the time of the change.[5] Payment at the unit prices specified in the contract would not be adequate compensation in view of the ma-

[5] The proper method of computing an equitable adjustment is the reasonable cost of the extra work and materials plus profit. *Bregman Construction Corp.*, ASBCA No. 15020 (Apr. 13, 1972), 72-1 BCA par. 94111 at p. 43,718. Actual costs incurred by the contractor are presumed to be reasonable and establish a prima facie case for recovery. *Ocean Technology, Inc.*, ASBCA No. 21363 (Apr. 28, 1978), 78-1 BCA par. 13204. Although the presumption is rebuttable, the Government did not audit appellant's costs and has not otherwise overcome the presumption.

terially increased costs attributable to the change. Accordingly, the Board finds that appellant is entitled to the full cost of performing the additional hours of pumping caused by the change in the sum of $190,383.83.

Appellant argues on p. 9 of its motion that the limitation of 15 percent of actual necessary costs for profit contained in General Provision No. 32 of the contract should not apply since the preferred method of pricing a change under that provision is a stated lump sum price negotiated in advance between the contractor and the contracting officer. The lump sum, in appellant's view, would not have limited profit to 15 percent. Contrary to appellant's assertion, General Provision No. 32 gives the contracting officer the election, for any reason, to use either the lump sum method or actual necessary costs plus a fixed fee not exceeding 15 percent for profit. Further, appellant did not recognize until most of the contract had been performed that the Government's directions as to the placement of the sand had caused a change.[6] Consequently, the contracting officer did not have the opportunity to negotiate a lump sum in advance and had no choice but to elect to follow the second method for determining costs and profit.

In its original decision on the amount of the equitable adjustment, the Board found the 15-percent limitation to be binding and no valid reason has been advanced for a different result. We therefore compute the profit as 15 percent of $190,383.83 or $28,557.57. The total equitable adjustment to which appellant is entitled is therefore the sum $218,941.40.

With respect to interest, appellant asserts in its argument No. 5 that the Board should determine the interest instead of returning the matter to the contracting officer. The payment of interest clause which the Board found applicable provides that interest shall run from the date of the written appeal to the date of mailing to the contractor of a contract modification carrying out the decision of the Board.[7] As the Board cannot determine in advance when the contracting officer will implement this decision by mailing such modification, the duration of the period for which interest runs must necessarily be determined by the action of the contracting officer.

Conclusion

On reconsideration, the Board finds that appellant is entitled to an equitable adjustment in the amount of $218,941.40 and remands the matter to the contracting officer for determination of the amount of interest to be paid from Dec. 27, 1973, to the date of mailing a con-

[6] Appellant first notified the contracting officer of his claim for a change by letter of Aug. 15, 1973 (Appeal File Exh. 19). Performance of the contract was substantially complete on Sept. 19, 1973 (Appeal File Exh. 14).

[7] See fn. 6 to the Board's decision of July 6, 1978. The parties stipulated that interest should run from Dec. 27, 1973 (II Tr. 17).

tract modification implementing this decision, pursuant to the applicable payment of interest clause.

G. HERBERT PACKWOOD,
Administrative Judge.

WE CONCUR:[8]

WILLIAM F. MCGRAW,
Chief Administrative Judge.

RUSSELL C. LYNCH,
Administrative Judge.

BUREAU OF LAND MANAGEMENT
v.
HOLLAND LIVESTOCK RANCH ET AL.

39 IBLA 272

Decided *February 15, 1979*

Appeals from decisions by Chief Administrative Law Judge L. K. Luoma (California 2-77-1(SC)) and Administrative Law Judge Harvey C. Sweitzer (California 2-75-2(SC)) finding appellants liable for willful and repeated grazing trespasses and reducing appellants' grazing privileges.

California 2-77-1(SC) is affirmed as modified; California 2-75-2(SC) is affirmed as modified.

1. Administrative Procedure: Burden of Proof—Administrative Procedure: Decisions—Administrative Procedure: Hearings—Administrative Procedure: Substantial Evidence—Evidence: Burden of Proof—Evidence: Sufficiency

After holding a hearing pursuant to the Administrative Procedure Act, an administrative law judge may properly find that a person has committed a grazing trespass if that finding is in accordance with and supported by reliable, probative, and substantial evidence.

2. Evidence: Generally—Grazing Permits and Licenses: Trespass—Rules of Practice: Evidence—Trespass: Measure of Damages

Where the evidence as to specific trespass indicates that of a number of cattle counted some were located on private intermingled land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going onto the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands.

3. Estoppel—Federal Employees and Officers: Authority to Bind Government—Grazing Permits and Licenses: Generally

Estoppel to preclude a charge of trespass is not invoked against BLM where BLM's partially completed fences on Federal land do not restrain cattle and there is no evidence that BLM agreed to construct and/or maintain said fences for the benefit of the grazier, and such grazier was at all times aware of these facts.

4. Estoppel—Federal Employees and Officers: Authority to Bind Government—Grazing Permits and Licenses: Generally

[8] Administrative Judge George S. Steele, Jr., who participated in the Board's decision of July 6, 1978, is no longer a member of the Board.

The grazing regulations (43 CFR 4140.1 (b)(1), *inter alia*) (formerly 43 CFR 4112.3–1(a) and (b)) place the responsibility of controlling cattle squarely on the grazier, and Government range management policies as implemented under acts of Congress cannot be asserted to bar sanctions where trespasses have been proved, or to estop BLM from alleging trespasses.

5. Grazing Permits and Licenses: Generally—Grazing Permits and Licenses: Cancellation or Reduction—Grazing Permits and Licenses: Trespass

An administrative law judge's finding that trespasses were willful, grossly negligent, and repeated will not be disturbed on appeal where the record amply supports such finding.

6. Grazing Permits and Licenses: Generally—Grazing Permits and Licenses: Cancellation or Reduction—Grazing Permits and Licenses: Trespass

Where penalties imposed by two administrative law judges for trespasses are supported by the records and comport with the proscriptions of the regulations they will not be modified on appeal except insofar as they conflict with respect to a particular grazier in a particular grazing district.

APPEARANCES: Jack D. Dwosh, Esq., and Robert R. Lee, Esq., Covey and Covey, P.C., Los Angeles, Calif., for appellants; Bryce Rhodes, Esq., Hawkins, Rhodes, Sharp & Barbagelata, Reno, Nevada, for intervenor John Hancock Mutual Life Insurance Co.; Burton J. Stanley, Esq., and James E. Turner, Esq., U.S. Department of the Interior, Office of the Regional Solicitor, Sacramento, Calif., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

These are consolidated appeals from separate decisions by Chief Administrative Law Judge L. K. Luoma (California 2–77–1, June 13, 1978), and Administrative Law Judge Harvey C. Sweitzer (California 2–75–2, Aug. 4, 1978), finding appellants liable for monetary damages for willful and repeated grazing trespasses, and reducing appellants' grazing privileges.

The decision in 2–75–2 involves the Susanville and Winnemucca grazing districts. The Susanville District is mostly in California but extends into Nevada, abutting on the Winnemucca District in Nevada. A fence with several gates partially divides these two areas. The trespasses in 2–75–2 were alleged to occur in both grazing districts within the Cal–Neva Unit in the Susanville District, and the Buffalo Hills Resource Area of the Winnemucca District. Appellants [1] own, lease or control areas of private land in both districts which are intermingled with public lands. John J. Casey, appellants' controlling owner, held a license to graze cattle in the Cal–Neva Unit (Susanville) through Feb. 28, 1975. At

[1] Holland Livestock Ranch is a co–partnership composed of three corporations: Bright–Holland Co., Maremont–Holland Co., and Nemeroff–Holland Co. John J. Casey owns controlling interest in all three.

times pertinent to the decision in 2–77–1, Mr. Casey held no license in the Cal–Neva Unit. At all times relevant to the proceeding in 2–75–2, Casey held a license to graze cattle in the Buffalo Hills Resource Area (Winnemucca).

The proceeding in 2–75–2 involves 15 alleged trespasses in the Susanville District and 10 alleged trespasses in the Winnemucca District. The trespasses, as to number of cattle involved, periods of time, AUMs consumed, and location are summarized in a table on pp. 2–5 of Judge Sweitzer's decision.

The proceeding in 2–77–1 concerns three trespasses, all alleged to have occurred in the Susanville District.

In both proceedings, the commercial rate for forage used (both grazing districts) was $3.50 per AUM.

The issues, as stated by appellants in their opening briefs and acknowledged by the Bureau of Land Management (BLM), are essentially as follows:

A. Whether the evidence was sufficient to show the physical location of the cattle allegedly in trespass;

B. Whether cattle may be considered to be in trespass while located on private, unfenced land because of unrestrained access to public lands;

C. Whether BLM should be estopped to allege trespass because it failed to construct and maintain certain fences, and because of its management policies on the Federal range;

D. Whether the element of willfulness was proved; and

E. An additional suggestion made by BLM in its brief is that one of the sanctions (reduction of grazing privileges) imposed by Judge Sweitzer in 2–75–2 was not sufficiently severe.

Each of these issues will be discussed in turn having reference to the findings and conclusions of the decisions appealed from and to the arguments made in the parties' briefs.

A.

Appellants contend that the methods employed by BLM to determine that cattle were trespassing were fraught with errors and irregularities; as a result it was not accurately shown that cattle were in fact trespassing in any specific instance. Appellants do not enumerate specific instances. They base this general argument on the testimony of Mr. Simpson, a licensed land surveyor who stated that the planning unit maps used by BLM to ascertain the locations of cattle were not accurate. However, Mr. Simpson also testified that no better maps were available and that if a survey were not available he would use the maps to determine trespass. Moreover, he could identify no specific inaccuracies in the maps.

As stated in Judge Luoma's decision, BLM employees also observed trespassing cattle from an airplane and from horseback. They ascertained the location of the animals by sighting geographical features of the terrain; used U.S. Geological Survey (USGS) topographic maps and planning unit maps, checking land status against master title plats. In addition cattle were identified by brand. Judge Luoma found that BLM's methods "entailed more than a cursory inspection of the animals" and that the "aerial surveys supplemented by ground counts and brand inspections were sufficient to establish the fact and duration of the trespasses" (2–77–1, p. 6).

Judge Sweitzer made the following findings as to this issue at p. 16 of his decision in 2–75–2:

> Although it may very well be that these agents of the BLM can and do make mistakes in estimating distances on the ground, I find from their testimony that they are experienced map readers and I accept their estimation as sufficient in determining the cattle's approximate locations. Respondents have failed to prove or even introduce evidence to show that the cattle were not, in fact, found where agents of the Bureau of Land Management testified that they were found.

Judge Sweitzer gave the following summary and evaluation of Mr. Simpson's testimony:

> [He] testified that to determine whether a particular parcel of land was, in fact, private or public land, he would initially consult the deeds at the local courthouse of the county in which the land is located. Apparently this information would give Mr. Simpson a sufficient legal description of the area concerned. Then he would utilize local maps of the area, including U.S. Geological Survey maps, county maps, road maps, and other maps of record, to commence actual search for original section corners established by the U.S. Government Land Office surveys of the late 1800s. Then, through surveys, he would lay out the actual boundaries of the land in question. He also testified that master title plats are useless in determining actual locations on the ground. Apparently, this is because the master title plats may give indications of ownership on the public domain in terms of sections; however, knowing the ownership of a particular section does not assist in determining where that section is located. He explained the physical location of any given section can only be affirmatively established by a survey working from well-established section corners. He stated that the location of sections on the planning unit maps could be as much as a mile off from their true locations. Despite this, Mr. Simpson did not testify as to whether any given section boundary on the Susanville and Winnemucca maps is, in fact, as much as a mile off from its true location. The most he would say about the accuracy of these maps for determining section boundaries were that they provided "a general indication of the areas distinction between private and public lands."
>
> 2–75–2, p. 16.

Judge Sweitzer's conclusion is as follows:

> Although I do not question Mr. Simpson's testimony regarding the procedures that a professional surveyor would undertake to establish boundaries on private lands, I do question the necessity for such a procedure in order to determine the location of trespassing animals. I find that such a procedure as he described to be unwarranted and unnecessarily expensive and time-consuming for purposes of proper range management, and that the method described by agents of the Bureau of Land Management is sufficient to es-

tablish a prima facie case as to whether cattle are found on public or private lands. Although respondents have attempted to cast doubt upon the accuracy of such a method, no evidence was introduced which shows, in fact that the agents of the Bureau of Land Management had erred in their determinations. Therefore, absent contrary probative evidence, I accept the government testimony as to whether cattle were found on public or private lands. The results of this finding with respect to each trespass is shown in the Conclusions section of this decision.

2–75–2, p. 17.

[1] The decisions appealed from set forth in detail the evidence relied upon to substantiate the individual trespasses found by the administrative law judges to have occurred. The contentions presented to the Board by appellants were fully considered by the judges. On appeal, appellants suggest in addition that the quantum of evidence adduced to support the alleged trespasses may not have been "substantial" as required by the Administrative Procedure Act, 5 U.S.C. § 556(d) (1976) which reads in part: "A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." Substantial evidence has been described as the kind of evidence a reasonable mind might accept as adequate to support a conclusion. *John W. McGrath Corp.* v. *Hughes*, (C.A. N.Y. (1959)), 264 F. 2d 314 (2d Cir. 1959) *cert. denied*, 360 U.S. 931 (1959). In *Bureau of Land Management* v. *Ross Babcock*, 32 IBLA 174, 183–4, 84 I.D. 475, 479–80 (1977), the Board stated with respect to sufficiency of evidence:

> In a hearing held pursuant to the Administrative Procedure Act, a decision must be in accordance with and supported by reliable, probative, and substantial evidence, but the decision need not be supported by so much evidence as would dispel all reasonable doubt. 5 U.S.C. § 556(d) (1970). Therefore, an Administrative Law Judge may properly find a grazing trespass has been committed where there is reliable, probative and substantial evidence of the trespass.

Both decisions below more than meet this test and appellants' challenges fall short of demonstrating error therein. Accordingly, we find no reason to disturb the findings and conclusions of either decision with respect to the issue of sufficiency of evidence to prove cattle in trespass.

B.

We turn now to the second issue which is whether cattle may be considered to be in trespass when they have unrestrained access to the public lands. Judge Luoma so ruled in 2–77–1. However, Judge Sweitzer in 2–75–2 distinguished *Babcock*, *supra*, where the Board held that in some cases cattle found and counted on unfenced private lands may be presumed to obtain portions of their forage from the public lands, as follows:

> First, Babcock's lands were totally unfenced, thereby allowing more freedom

for cattle to drift across private land boundaries. In the present case, the evidence shows some fencing, albeit with gaps, which would tend to decrease the chances of drifting. Secondly, the facts in *Babcock* suggest that appellant there could utilize his lands only in conjunction with a federal license, whose terms he violated by turning the cattle out early without effective restraint. Here, respondents have no license in the areas of the alleged trespasses within the Susanville District, and it is not apparent that federal lands must be utilized in order for them to utilize their own lands. This factor was an important consideration in *Nick Chournos*, A-29040 (Nov. 2, [6] 1962), a case cited by the Board to support its holding in *Babcock*. Moreover, although there is no indication in the decision of the size of the parcels of land in *Babcock*, the areas of land involved could have a bearing on the validity of the presumption that cattle considered as a whole, would obtain a percentage of their forage from the public lands. In the instant case, respondents control extensive holdings in the Cal-Neva Common Allotment and the effect of a strict application of the rule in *Babcock* could conceivably have a devastating impact on the use of respondents' private lands. For example, if but one cow of a herd of several hundred should stray through a break in a fence surrounding a large private ranch, the government might consider the fence as ineffective and trespass the entire herd. There is no evidence in the record as to the total number of Casey cattle grazing on private lands, hence the reasonableness of the use of the presumption is difficult to assess in this case.

Many factors other than fences (such as the quality and quantity of forage, salt licks, availability of water, and terrain features) may limit the movement of cattle from private to public lands. In this case, the government has generally failed to present any evidence other than the poor fence conditions to show trespasses of those cattle counted on private lands. Presumptions against the respondent[s] in a case of alleged trespass should be used with care and I am unwilling to apply so strict a presumption on the basis of the evidence presented here. Thus, as applied to this case, I find that only cattle observed on the federal range may be counted as in trespass absent reliable, probative and substantial evidence that cattle found on private land would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands. A review of the record on the whole does not provide such evidence.

2-75-2, pp. 10-11.

BLM has appealed Judge Sweitzer's holding, contending that the facts adduced in 2-75-2 fit squarely within the *Babcock* rule. BLM asserts that in virtually every case where cattle were counted on private lands, there were no fences or barriers, artificial or natural, which would in any way impede the cattle from entering the public land. BLM cites several transcript references where the question was asked whether there was any physical barrier which would in any way inhibit "the cow that you observed" from walking onto land owned by the United States. In each case, the answer was in the negative.[2] BLM concedes that appellants did have certain fences which were not in "excellent shape" but asserts that it did not trespass cattle found within such fenced areas. It states that the trespasses for which it sought damages were for cattle uniformly located on private intermingled lands where no barrier whatsoever, either

[2] The transcript references are: 2-75-2 pp. 1-571, 1-640, 1-704, 2-27, 2-60.

natural or artificial, would have prevented the cows from entering the public lands.

Judge Sweitzer (2–75–2, p. 17) accepted the Government's testimony as to whether cattle were found on public or private lands, and this finding is reflected in the conclusory section of his decision with respect to each trespass litigated. On p. 23, the judge stated: "Cattle counted on private lands have been deducted from the numbers testified to by government employees."

[2] We believe that Judge Sweitzer's refusal to count cattle located on private lands, but with access to public lands, is in error, and we modify his decision with respect to each of five trespasses in which he deducted cattle found on private lands. We have correlated each of these trespasses to the transcript citations given by BLM and we base our modification of the decision on the unrefuted testimony that in each instance nothing would have prevented the animals from going onto the public land. The Board stated in *Midland Livestock Co.*, 10 IBLA 389, 402 (1973), "[A]s the boundaries between the federal range and private lands were of a legal rather than a physical nature it strains credibility to believe that the animals grazing would respect the same."

The five trespasses in question are Nos. 142, 173, 176, 177, and 178, all in the Susanville grazing district. The judge's disposition of these trespasses is found on pp. 25–27 of his decision (2–75–2). We adopt here in the judge's method of calculating damages which is as follows (p. 23): The animal unit months of forage consumed is the product of the number of cattle found in trespass and the number of days of trespass. This product is divided by 30 (number of days per month). The number of cattle designated as in trespass during a term of days in which a count is not made is the lesser number of either the beginning count or the ending count when the trespass was terminated by a subsequent count. The amount of forage consumed is further adjusted by multiplying the total AUMs by the ratio which the forage on public lands bears to the total available forage in the two separate districts. The result is then multiplied by twice the stripulated commercial rate for forage, $7 per AUM. A fractional AUM is rounded up to the next whole number.

Trespass No. 142 (Tr. 1–522, 571). The judge deducted 13 cattle from a total of 55 because 13 were found on private land. He found 42 cattle in trespass for 7 days. In the second portion of this trespass, he found 15 cattle in trespass for 6 days having deducted one animal which was counted on private land. The judge's result is a total of 11 AUMs amounting to $77 in damages. Including the cattle counted

on private land, we reach a result of 16 AUMs amounting to $112 in damages.

Trespass No. 175 (Tr. 1–640). The judge deducted 22 cattle from a total of 67 because 22 were found on private land. Thus he calculated that 45 head were in trespass for 4 days resulting in 6 AUMs and damages of $42. Including the 22 head counted on private land, we reach a result of 9 AUMs and $63 in damages.

Trespass No. 176 (Tr. 1–704). The judge deducted 4 cattle from a total of 46 because 4 were found on private land. The judge found 42 cattle in trespass for 14 days. Of these 42, 5 were removed by appellants and 37 remained in trespass for 31 days. He calculated 50 AUMs for damages of $350. Including the cattle counted on private lands gives 64 AUMs for $448 in damages.

Trespass No. 177 (Tr. 2–27). The judge deducted 4 cattle from a total of 10 because 4 were counted on private lands. He found that 6 head were in trespass for 2 days. He also deducted 4 cattle from 30 because 4 were counted on private lands, finding that 26 were in trespass for 14 days. He calculated 11 AUMs and damages of $77. Adjusting for the cattle found on private lands we obtain 15 AUMs for $105 in damages.

Trespass No. 178 (Tr. 2–60). The judge deducted 13 cattle from 120 finding that 107 were in trespass for 1 day. He also found that 91 were in trespass for 11 days. The judge calculated 32 AUMs and damages at $224. We calculate 38 AUMs for damages of $266.

For violations in the Susanville grazing district, Judge Sweitzer assessed a total of $1,239. We add $224 (additional damages, as hereinabove calculated for cattle counted on private lands) for a total of $1,463.

Judge Luoma in 2–77–1, p. 6, stated with respect to the access trespass issue: "I find that the trespass notices for animals found on unfenced private land were valid because the animals were free to drift and graze onto the Federal range, *Bureau of Land Management* v. *Ross Babcock*, 32 IBLA 175 (1977)." *Cf. Midland Livestock Co., supra.*

C.

Appellants assert that BLM should be estopped from alleging the occurrence of trespasses because BLM failed to construct and/or maintain certain fences. One fence in question is the Susanville/Winnemucca grazing district division line fence which was incomplete so that the two districts were not in fact separated. Appellants assert that because the fence was incomplete it had no maintenance responsibility, no division line existed, and any license to graze upon one district constituted a license to graze both districts. Appellants proffer the same arguments with respect to two other fences, which, because of their states of completion or repair, were ineffective to restrain cattle. Appellants also suggest that BLM's range manage-

ment practices had the effect of increasing the population of wild horses and burros which in turn caused a loss of forage and destruction of cattle control devices.

Judge Sweitzer's disposition of these arguments (pp. 12–13, 2–75–2) is as follows:

> The short answer to these contentions is that estoppel is generally not applicable against the government. See *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947). Despite the *Merrill* case, however, many circuit court cases have applied the doctrine of equitable estoppel against the government where "justice and right require it." See *Davis, Administrative Law of the Seventies*, § 17.01 (1976). However, in those cases which have held the government estopped, certain elements have been proved to invoke the defense. The Supreme Court has held that:
>
> "As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. * * *" *Utah Power & Light Co.* v. *U.S.*, 243 U.S. 389, 409 (1917).
>
> The court has since left open the question of whether *affirmative misconduct* (rather than neglect) on the part of the government might estop it. *Montana* v. *Kennedy*, 366 U.S. 308 (1961). There is no allegation in the argument of respondents that the acts here complained of are a result of affirmative misconduct and the estoppel claim must fail on that ground alone.
>
> Additionally, the Ninth Circuit in *U.S.* v. *Wharton* has outlined the elements of estoppel [[2]] that must be proved to establish the defense.
>
> "(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.
>
> 514 F. 2d 406, 412 (9th Cir. 1975).
>
> Even if the facts alleged are true, respondents' conduct in allowing their cattle to graze on the federal range can in no way be said to be based on ignorance of the true facts, i.e. that the fences were not constructed or properly maintained or that wild horses and burros were tearing down fences. Respondents knew or should have known the conditions complained of at the time cattle were placed on the range and cannot be said to have justifiably relied on any promise of action on the part of the government. The government may be in some small part responsible for conditions which would tend to make prevention of trespasses by respondents more difficult, but the allegations of respondents do not approach the requirements for invoking estoppel as a defense.

Responding particularly to the judge's statement of the law on estoppel, appellants concede that they "knew the facts surrounding the failure to construct the division fences" but assert that BLM "adduced no evidence whatsoever suggesting that at the time the agreements were entered into that appellants had any knowledge whatsoever of the true course of conduct that would be followed by [BLM]" (Brief pp. 15–16). Appellants state that their reliance and injury are amply demonstrated.

In its brief BLM states that no trespasses were cited because of inadequate fences, that it is the re-

[2] *Cf. Union Oil Co. of Calif.* v. *Morton*, 512 F.2d 743, 748 (9th Cir. 1975).

sponsibility of the cattle operator to keep his cattle where they belong, and that the record contains no evidence of the "agreements" referred to by appellants. BLM further states that the United States is not obligated to fence the public lands for proper range management and that wild horses are on the public range because of an act of Congress, 16 U.S.C. §§ 1331–1340 (1976).

[3, 4] It is our view that all of appellants' contentions concerning estoppel lack merit and were properly disposed of by Judge Sweitzer.

A grazing trespass exists where livestock are grazed on Federal public land in excess of the authorized permit use or without an appropriate permit or license. *Eldon Brinkerhoff*, 24 IBLA 324, 83 I.D. 185 (1976); *Eldon L. Smith*, 8 IBLA 86 (1972). Government range management policies as carried out under the "Federal Range Code" (Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, *as amended*, 43 U.S.C. § 315 (1976), and regulations promulgated thereunder) cannot be asserted to bar the implementation of prescribed sanctions where trespasses have been proved.

43 CFR 4112.3–1,[4] in force and effect at all times pertinent to this decision, provides that:

> (a) Grazing livestock upon, allowing livestock to drift and graze on, or driving livestock across the Federal range, including stock driveways, without an appropriate license or permit, regular or free-use, or a crossing permit.
>
> (b) Grazing livestock upon or driving livestock across the Federal range, including stock driveway, in violation of the terms of a license or a permit, either by exceeding the number of livestock permitted, or by allowing livestock to be on the Federal range in an area or at a time different from that designated, or in any other manner.

are prohibited acts. The regulation places the responsibility of controlling cattle squarely on the cattle operator and the case law is to the same effect. *Cesar and Robert Siard*, 26 IBLA 29 (1976); *O. R. Britain*, A–25962 (Jan. 24, 1951).

Appellants point out that Judge Luoma did not comment on estoppel in 2–77–1. Our discussion of the nonapplicability of estoppel to the facts herein involved needs no further emendation.

D.

Appellants contend that both judges erred in finding the trespass to be willful. They assert that trespasses were beyond their control because there were broken fences and because gates were opened by others. Appellants state that they made efforts to round up cattle which had crossed division lines to rebuild damaged fences, and to add new fences. They further state that they acted to remove cattle when notice of trespass was actually received. Appellants also appear to argue that they, as grazing licensees, were

[4] The new regulation, 43 CFR 4140.1(b)(1) (Cir. No. 2433), provides that:

"Allowing livestock on or driving livestock across these lands without a permit or lease or in violation of the terms and conditions of a permit or lease, either by exceeding the number of livestock authorized, or by allowing livestock to be on these lands in an area or at a time different from that designated;" are prohibited acts.

somehow deprived of a property right without due process of law.

As appellants themselves point out, Judge Sweitzer, in 2–75–2, considered mitigating circumstances but was compelled to conclude that they were outweighed by evidence demonstrating willfulness. We quote Judge Sweitzer's thorough analysis of this issue (pp. 19–22):

> The Interior Board of Land Appeals has formulated the following standard regarding "willfulness" in the context of grazing trespass:
>
> "Although "willfulness" is basically a subjective standard of the trespasser's intent, it may be proved by objective facts. Thus, in determining whether grazing trespasses are "willful," intent sufficient to establish willfulness may be shown by evidence which objectively shows that the circumstances did not comport with the notion that the trespasser acted in good faith or innocent mistake, or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent." (citations omitted) *Eldon Brinkerhoff, supra* at 191.
>
> Mr. Casey's state of mind reflecting on the willful nature of the actions involved is disclosed by several factors. First, despite his extensive land holdings and large number of cattle, he employed only two persons during the period of time involved to control the cattle in the Susanville and Winnemucca Districts. Mr. Brunson worked for Casey for approximately six months and Mr. Syriac's duties were unspecified and the length of time in which he worked for Mr. Casey is not disclosed on the record. Further, Mr. Casey's testimony indicates that he spent only minimal time on his properties involved in this proceeding. It is thus apparent that Mr. Casey has willfully failed to provide sufficient manpower to control cattle on his ranch. This factor is compounded by the poor conditions of the fences surrounding his private lands in the Susanville District. The record is replete with testimony and photographs that detail the extent of the poor fence conditions. Further, it is apparent from Mr. Casey's testimony that he was aware of the poor conditions in several of the areas concerned. Despite knowledge of the conditions of the fence, he testified that he managed to ride parts of the fences every six months (with some parts more often (Tr. p. 4–307)). Although he testified that the condition of the fences were, in part, caused by factors beyond his control, that is, depredation by either wild horses or by hunters or tourists in the area, such mitigating factors are of little help to respondents absent specific evidence as to the time and place of the depredation leading to specific trespasses involved (see *John Gribble*, 4 IBLA 134, 137 (1971)).
>
> Mr. David E. Iveson, a rancher in the Winnemucca District, testified that in the latter part of July of 1975, he observed a Mr. Lawson open a gate and lead cattle onto the public range within the closure area. He surmised that Mr. Lawson did so to prevent the approximately 40 head from breaking through a fence surrounding his private lands to obtain water (Tr. p. 4–244). He testified that a fence served as a boundary of the closure area and that it had the effect of preventing cattle access to water (Tr. p. 4–247). Mr. Iveson also testified that he personally opened the gate to allow cattle to get water in mid–August, 1975 (Tr. p. 4–253).
>
> Although both of these incidents might, in an applicable case, be sufficient to mitigate an otherwise willful trespass, neither incident helps respondents in this case. The gate was described as being on the east side of the closure area and the cattle would get their water south of the drift fence and on the eastern side of the closure area. The only cattle counted

as being in trespass in July and August, 1975, on the closure area, were three to six miles west of the gate. Thus, from Mr. Iveson's testimony, the cattle counted in trespass were not likely to be the same cattle as those led through the closure area fence.

Further evidence of Mr. Casey's willingness to allow his cattle to trespass is his testimony as to his operation regarding the placement of cattle on the western boundary of the Winnemucca District (where he had a license) with apparent knowledge that the cattle would drift across the District boundary to the Susanville District (where he had no license). (See Tr. pp. 4-181, 182 and 4-307).

Another indication of Mr. Casey's mental state is reflected in his apparent disregard of the conditions of his licensed use on the federal range. He evidently could not remember whether or not he had a license to graze in the Cal-Neva planning unit of the Susanville District in 1975 (Tr. p. 4-300). Another more blatant example of his cavalier attitude toward public land management policy is his apparent disregard of the terms of his licensed use in the Winnemucca District. In defense of the trespasses within the closure area, Mr. Casey claimed that cattle drifted from an area licensed to his use west of the closure area. That area was licensed for winter use only (District Manager's decision dated May 17, 1968), yet most of the trespasses occurred during the summer and fall of 1975. When questioned about grazing west of the closure during a time not authorized by the license, the following dialogue occurred:

"Q (by Mr. Stanley). Isn't is [*sic*] true that the area is restricted to winter use only?

"A (by Mr. Casey). No, it is not. It is the intention of the Bureau of Land Management that it is, but is the contention of me that it isn't.

"Q. You are aware of a 1968 decision—

"A. Yes, I am, which has never been followed, enforced or had anything else to do with this deal." (Tr. p. 4-325).

Mr. Casey's proclivity is shown to be one of ignoring range practices or rules not comporting with his personal concepts. He has either willfully permitted his cattle to trespass or has willfully failed to restrain them from trespassing, or both.

In addition to being willful in nature, the trespasses are clearly "repeated." As I have previously held, past settlements or trespass damages may be considered in determining the repeated nature of respondents' acts. The record shows that Mr. Casey has a long history of trespass violations commencing in 1956 (Ex. 2) extending through the present case. These actions resulted in decisions being rendered after hearing, and monetary settlement without hearing, involving 74 citations or warning letters against respondents. (Exs. 2-6, 6a). Moreover, even if the previous actions were not considered, I find that facts of the instant case considered alone would more than meet this requirement of being repeated. *Brinkerhoff's* third requirement, that the trespasses occur over a fairly long period of time is also met by these numerous trespasses.

Brinkerhoff's second requirement to justify severe sanctions is that the trespasses involve "fairly large numbers of animals." The *Brinkerhoff* case itself concerned 4 violations involving a total of 88 cattle in 1973 and 3 violations involving 17 cattle in 1974, (plus some violations involving failure to comply with eartagging requirements) totaling 21 AUMs (*Brinkerhoff*, *supra*, at 186, 191) which was characterized as constituting "fairly large numbers." Examining the trespasses set out in the Conclusions section of this opinion, I have found 21 violations totaling 351 animal unit months. This very clearly establishes that this requirement of *Brinkerhoff* has been met.

Concerning *Brinkerhoff's* mention regarding failure to take prompt remedial action, I observe the following. Testimony disclosed that Mr. Casey used 2905 Virginia Street, Reno, Nevada, as his official address for correspondence from BLM. His employees at that address were in-

structed to hold the correspondence until Mr. Casey picked it up (Tr. pp. 4–178, 353). Mr. Casey testified that he runs ranching operations in Montana and consequently returns to Nevada only on a periodic basis. Accordingly, it may be several days or weeks until actual notice of trespass is received by respondents (Tr. p. 4–177). Thus, under this mode of operation, prompt remedial action to remove cattle from the range is impossible. Mr. Casey testified to the use of two employees over unspecified periods of time but their duties were vague (Tr. pp. 4–205 through 207). The two employees were not called as witnesses and hence their responsiveness in taking prompt remedial action is left in considerable doubt. Positive evidence of lack of prompt remedial action is shown by the length and frequency of the trespasses shown in the complaint. Some trespasses extended over a period of several weeks and were terminated upon recounts of cattle and not npon notification or removal. (See, *e.g.*, Trespass Nos. 86A, 86B, 85). I find from these circumstances that respondents have generally failed to take prompt remedial action concerning abatement of the trespasses.

I therefore find that the trespasses, where proven, are willful in nature, and repeated, and are shown to contain all the elements necessary to justify sanctions, including severe reductions, as permitted by 43 CFR 9239.3–2 as contemplated by the *Brinkerhoff* decision.

Judge Luoma's summation of the evidence leading him to conclude that the trespasses were willful, is as follows (2–77–1, pp. 6–8):

Respondent employed three persons, some of whom worked part time, to supervise operations in the Susanville and Winnemucca Districts (Tr. 311, 314). When served with notice No. 195, Respondent called an employee and told him to rectify the problem, however, nothing was done to abate the trespass (Tr. 319–322). Others who had received trespass notices rode with Complainant and claimed their cattle. All those involved, including Respondent, were invited to accompany Complainant when the cattle were rounded up (Tr. 148). Respondent's cattle, alone, were impounded.

The fences along the north side of the Rush Creek Ranch were in bad shape, were down in many spots, and Respondent's cattle wandered in and out of the fenced area (Tr. 180–181). Nothwithstanding, [*sic*] Respondent left livestock in the Rush Creek Ranch and did not repair the fence. The cattle which were involved in the trespass for which notice No. 203 was issued came from the Rush Creek Ranch (Tr. 326).

The three trespasses which are the subject of this decision were first noticed by Complainant in April 1976. The trespass for which notice No. 180 was issued was terminated because of the turnouts by users, and the trespass for which notice No. 195 was issued was initiated at the end of the summer grazing season when all users were to be off the range (Tr. 96, 97, 159). In fact, Respondent stated that November 1 was a fair date to start the trespass investigation for which notice No. 195 was issued (Tr. 159). In all, 238 cattle were in trespass at times relevant to this proceeding.

Respondent checked some gates in the Winnemucca District fence two or three times a year, however, Respondent did not check all gates. This was notwithstanding that maintenance of the fence is the responsibility of the users (Tr. 29, 327). Respondent concedes that some cattle were found out of fenced fields at various times during the year (Tr. 304, 306).

Respondent did not alleviate the trespass for which notice No. 180 was written (Tr. 318). The trespass for which notice No. 203 was written was terminated because Respondent promised that the cattle in trespass would be rounded up, yet Respondent introduced

no evidence that such a roundup was conducted. In general, Respondent took little action to alleviate the subject trespasses once notified of them (Tr. 316).

Although a subjective determination of intent, willfulness may be shown by evidence that the trespasser did not act in good faith or through innocent mistake, or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent, *Eldon Brinkerhoff*, 24 IBLA 324 [83 I.D. 185] (1976).

I find that the subject trespasses were willful because Respondent exercised little control over his cattle and a large number of cattle were in trespass. Upon notification of the trespasses, Respondent did nothing to abate the condition. Respondent's cattle had been found in trespass repeatedly since 1956, many times in the Susanville District. The Rush Creek fence was in disrepair, and gates in the Winnemucca fence were left open, even though it is the duty of the users in those areas surrounding the Susanville Grazing District, of which Respondent was one, to maintain the fences. In effect, Respondent did not act in good faith in maintaining fences or in managing his cattle and the trespasses were the result of Respondent's negligence.

[5] Appellants' arguments fail to demonstrate error in either decision, and we perceive none therein, concerning the issue of willfulness. Appellants' contention with respect to being deprived of a property right without due process is diaphanous, at best. In any event, it has been held that grazing permits issued under section 3 of the Taylor Grazing Act do not create property rights. *United States* v. *Fuller*, 409 U.S. 488 (1973). *Cf.* 43 U.S.C. § 1752(a) (1976).

Judge Sweitzer's final order in 2-75-2 reads as follows:

The District Manager of the Susanville District is directed to issue no authorization to Respondents to graze livestock in said District until money damages of $1,239 are paid.

The District Manager of the Winnemucca District is directed to issue no authorization to Respondents to graze livestock in said District until money damages of $4,159.05 ($1,218 for trespass and $2,941.05 for impoundment costs) are paid.

Each District Manager is directed to thereafter issue no license or permit to graze more than sixty percent (60%) of the authorized active use attached to Respondents' base properties in each District.

The concluding portions of Judge Luoma's decision (2-77-1) are as follows:

PAST HISTORY OF THE TRESPASSES

On Jan. 13, 1956, Respondent's grazing license in the Nevada Grazing District No. 3 was suspended for 3 months (Exh. 22). On Nov. 23, 1960, Respondent's licenses were again revoked and future licenses were denied to Respondent in that district (Exh. 23). A continuous series of 14 trespass citations and warning letters issued to Respondent for the Susanville District, beginning with 1960 and extending into 1968, were noted and itemized in a decision issued on Sept. 4, 1969 (Exh. 24). Nine trespass citations, issued in 1969 for the Susanville District, resulted in a suspension of Respondent's grazing privileges for 5 years. Thirty-five additional trespass citations resulted in additional show cause orders which were either closed through offer of settlement or by a Nov. 17, 1971, agreement between Complainant and Respondent (Exh. 25). Three trespass citations, issued to Repondent in December 1972 and January 1973, were closed through a monetary settlement at twice the commercial rate. Four trespass citations resulted in a decision issued on

Jan. 7, 1974, which assessed monetary settlement against Respondent at twice the commercial rate (Exh. 26, 28). Nineteen trespass citations were issued from Jan. 17, 1975, through Mar. 19, 1976 in the Susanville and Winnemucca Districts, and one impoundment action was initiated in the Winnemucca District which resulted in a hearing on May 4, 1976. These facts were alleged in Complainant's show cause order and I find that they constitute the record of Respondent's past trespasses.

DAMAGES AND PENALTIES

Where a grazing trespass is not clearly willful, damages are computed at the rate of $2 per AUM of Federal forage consumed, or the commercial rate, whichever is greater. Where a trespasser commits repeated grazing trespasses, a fine of twice the commercial rate is warranted. Where a grazing trespass is willful, or grossly negligent, suspension, reduction, revocation, or denial of renewal of a grazing license may be warranted. Regulatory factors, together with any mitigating circumstances, however, are to be considered in determining the extent of disciplinary action, 43 CRF 9239.3-2.

To justify a complete revocation of Respondent's grazing privileges the trespasses must be both willful and repeated, involve fairly large numbers of animals, and the trespasses must occur over a fairly long period of time. Finally, Respondent must have failed to take prompt remedial action upon notification of the trespasses.

Since the trespass violations were repeated, the damages must be assessed at twice the commercial rate. The parties established by stipulation that the commercial rate for grazing in the area is $3.50 per AUM (Tr. 156). Accordingly, damages will be calculated on the basis of $7 per AUM, as follows:

[For the sake of consistency, we have rounded off fractional AUMs to the next highest AUM and adjusted Judge Luoma's figures accordingly.]

Trespass No. 180

51 cattle×.467 mo. (4/8–4/21)×90% F.R.=[22] AUMs×$7=[$154]

Trespass No. 195

35 cattle×.533 mo. (11/1–11/16)×90% F.R.=[17] AUMs×$7=[$119]
80 cattle×.566 mo. (11/1–11/17)×90% F.R.=[41] AUMs×$7=[$287]
29 cattle×.600 mo. (11/1–11/18)×90% F.R.=[16] AUMs×$7=[$112]
4 cattle×.633 mo. (11/1–11/19)×90% F.R.=[3] AUMs×$7=[$21]
[$539]

Trespass No. 203

39 cattle×.233 mo. (1/28–2/3)×90% F.R.=[9] AUMs×$7=[$63]

Total damages = [$756]

Respondent's cattle comprised 93 percent of the cattle which were rounded up. I find, therefore, that 93 percent of the total impoundment costs should be paid by Respondent. Total impoundment charges were $5,992.74 and covered the costs for trucking, auction yard expenses, brand inspections, horse rental, per diem and salaries for the employees who went on the roundup, and advertisement costs. Accordingly, the appropriate proportion chargeable to Respondent is $5,573.25 (Exh. 20).

Finally, I must conclude with full recognition of the severity of such sanction, that Respondent's grazing privileges attached to each of the base properties in the Susanville Grazing District should be permanently revoked. The trespasses were both willful and repeated, involved large numbers of animals, and the trespasses occurred over a long period of time. Respondent's actions evidence no mitigating circumstances upon which a lesser sanction can be based.

ORDER

The District Manager is directed to permanently refuse to issue Respondent

any license or permit authorizing the grazing of livestock upon the Federal range in the Susanville Grazing District. Respondent is directed to pay to Complainant, within 30 days from the date of this decision, total damages of [$756] for forage consumed while Respondent's cattle were in trespass. Respondent is further directed to pay to Complainant, within 30 days, $5,573.25 as the proportionate share of impoundment charges.

[6] It is obvious that with respect to the Susanville grazing district the penalties imposed by the two judges conflict. The decision in 2-77-1 directs the permanent revocation of grazing privileges in that district, whereas 2-75-2 directs a 40 percent reduction of such privileges. In order to resolve the conflict, we affirm Judge Luoma's order and set aside so much of Judge Sweitzer's order as concerns appellants' reduction of grazing privileges in the Susanville grazing district. We believe this result is warranted in light of appellants' conduct as demonstrated by both proceedings and the many, many other trespass proceedings involving Casey.

The situation is different with respect to the Winnemucca District. Here, BLM has urged that Judge Sweitzer "did not go far enough" in that he reduced rather than revoked appellants' grazing privileges. The applicable regulation, 43 CFR 9239.3-2 states in relevant part as follows:

> A grazing license or permit may be suspended, reduced, or revoked, or renewal thereof denied for a clearly established violation of the terms or conditions of the license or permit, or for a violation of the act or of any of the provisions of this part, or of any approved special rule.

In *Brinkerhoff*, *supra*, at 337, the Board stated with respect to the imposition of sanctions:

> Generally, the Department has limited *severe* reductions of a licensee's or permittee's grazing privileges to cases involving the following elements: (1) the trespasses were both willful and repeated; (2) they involved fairly large numbers of animals; (3) they occurred over a fairly long period of time; and (4) they often involved a failure to take prompt remedial action upon notification of the trespass. *United States* v. *Casey*, 22 IBLA 358, 369, 82 I.D. 546 (1975); *see John E. Walton*, 8 IBLA 237 (1972); *Eldon L. Smith*, 8 IBLA 86 (1972); *Alton Morrell and Sons*, *supra* [72 I.D. 100 (1965)]; *L. W. Roberts*, A-29860 (April 23, 1964); *Clarence S. Miller*, 67 I.D. 145 (1960); *Eugene Miller*, 67 I.D. 116 (1960); *J. Leonard Neal*, 66 I.D. 215 (1959). A severe reduction may be a permanent loss of grazing privileges or a temporary loss of significant privileges for a period of years. [Italics in original.]

In our view, the regulation and the case law are so flexible as to permit alternative sanctions of varying degrees of severity. We have previously quoted that portion of Judge Sweitzer's decision in which he set forth his rationale (referring to *Brinkerhoff*) for imposing his sanctions. We believe that the reduction, rather than revocation of grazing privileges ordered by him was well within his discretion under the circumstances and comports with the regulation. We point out again that the regulation offers alternatives; it does not *mandate* revocation rather than reduction of privileges under a particular set of facts. BLM's urging that Judge Sweitzer's decision "did not go far

enough" in this respect, is, in the absence of specific error, insufficient reason for the Board to substitute its judgment for that of Judge Sweitzer as far as the Winnemucca grazing district is concerned.

Conclusion

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1:

a) The chief administrative law judge's decision in 2–77–1 is affirmed, except that the damages figure for trespasses is modified from $735.70 to $756.

b) The administrative law judge's decision in 2–75–2 is modified, with respect to the Susanville grazing district in that the district manager of said district is directed to permanently refuse to issue appellants any license or permit authorizing the grazing of livestock in said district.

c) The administrative law judge's decision in 2–75–2 is further modified to reflect a total of $1,463 in monetary damages due for trespasses in the Susanville District.

d) The remaining portions of Judge Sweitzer's order in 2–75–2 are affirmed.

FREDERICK FISHMAN,
Administrative Judge.

I CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

ADMINISTRATIVE JUDGE STUEBING CONCURRING:

While I concur fully in the majority opinion, including the modification of Judge Sweitzer's decision insofar as he allowed a deduction for those cattle which were observed on private lands with access to nearby public land, I would like to comment further on this point.

Judge Sweitzer noted:

> [T]he areas of land involved could have a bearing on the validity of the presumption that cattle considered as a whole, would obtain a percentage of their forage from the public lands. In the instant case, respondents control extensive holdings in the Cal–Neva Common Allotment and the effect of a strict application of the rule in *Babcock* could conceivably have a devastating impact on the use of respondents' private lands. For example, if but one cow of a herd of several hundred should stray through a break in a fense surrounding a large private ranch, the government might consider the fence as ineffective and trespass the entire herd. * * *
>
> Many factors other than fences (such as the quality and quantity of forage, salt licks, availability of water, and terrain features) may limit the movement of cattle from private to public lands.

I regard this as a cogent observation, and an important consideration to be taken into account in all such cases. Certainly it is not our intention to interdict or inhibit the legitimate use of private land for grazing.

When cattle are turned out on private land with access to public land, the question of whether they

do or do not derive some of their sustenance from foraging in trespass on the public land becomes a question of probabilities, as revealed by the evidence. Cattle seem unable to comprehend even the rudimentary concepts of the laws relating to real property, and have a notorious penchant for preferring their neighbor's grass.[1] So, if the evidence does not show that there are factors which make it unlikely that they range beyond their own boundaries, it must be presumed that they do.

The same factors might be considered in evaluating what proportion of their monthly forage is consumed in trespass. For example, if there is a terrain barrier a short distance beyond the boundary of the Federal land, it should not be presumed that the trespass extends beyond it. Or, if there is water in the center of a large tract of private land, and none on the adjacent Federal land, the ranging radius of cattle around their water source, as established by the evidence, should indicate whether, or to what extent, the cattle could be expected to intrude on the Federal land. The same factors might also be considered in determining whether a trespass was willful. For example, if despite the presence of physical impediments, large numbers of cattle are found deep in Federal land, far beyond where they would normally range of their own accord, a presumption arises that they were probably driven there.

The purpose of this dissertation is to dispel any notion that the mere presence of cattle on a parcel of unfenced or poorly fenced private land is, of itself, conclusive evidence that those cattle derive a portion of their sustenance by grazing in trespass on adjacent land.

However, in this instance, I am not persuaded by the evidence that the Casey cattle observed on private land were effectively limited to their own private range, and that the overwhelming probability is that they did in fact derive some of their sustenance by grazing in trespass. For this reason, with full respect for Judge Sweitzer's rationale, I concur in the majority's modification of his holding on this point.

EDWARD W. STUEBING,
Administrative Judge.

[1] "The grass is always greener on the other side of the fence." Anon.

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